Supreme Court, U.S.
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No. _____

In The
Supreme Court of The United States
October Term 1997

DARNELLA BARJON and LEE DURAN,
Petitioners,

v.

JOHN H. DALTON,
SECRETARY OF THE NAVY,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners were prevailing parties in administrative proceedings to redress discrimination by their federal employer. Under 42 U.S.C. Section 1988(b), they are entitled to recover reasonable attorney's fees. Petitioners' entitlement to fees, and the number of hours charged, are not at issue.

There is, however, one important federal question of first impression presented:

Is the "relevant legal community" for determining a prevailing hourly rate under 42 U.S.C. Section 1988(b) limited to the forum judicial district where expert *pro bono* local counsel realistically was unavailable to undertake federal sector employment discrimination litigation?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Darnella Barjon and Lee Duran pray this Court issue its writ of *certiorari* to review the December 22, 1997 judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is officially reported at 132 F.3d 496 and is reprinted in the Petitioners' Appendix ("Pet. App.") at A-2. The memorandum of opinion and order of the U.S. District Court for the Eastern District of California has not been officially reported and is reprinted in the Petitioners' Appendix at Pet. App. B-20.

JURISDICTION

The judgment and opinion of the court of appeals was entered on December 22, 1997. (Pet. App. A-2.) A timely petition for rehearing with suggestions for rehearing en banc was filed and denied on March 3, 1998. (Pet. App. A-1.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

42 U.S.C. Section 1988(b), as amended,[1] provides in relevant part:

> In any action or proceeding to enforce a provision of section[] . . . 1981a . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .

STATEMENT OF THE CASE

Barjon

In 1993, Petitioner Darnella Barjon ("Barjon") filed an administrative complaint against John H. Dalton, Secretary of the Navy ("Secretary") for discrimination in the failure to promote in her civilian federal employment at Mare Island Naval Shipyard ("MINS") in Vallejo, California, on the San Francisco Bay. (Pet. App. C-25.) An Equal Employment Opportunity Commission ("EEOC") administrative law judge ruled in Barjon's favor. The Navy's final agency decision in 1994 adopted the administrative judge's recommendations

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[1]The 1996 amendment to Section 1988(b), relating to a judicial officer's exposure to fees and costs for "action clearly in excess of . . . jurisdiction," is not relevant to this petition.

and awarded Barjon a retroactive promotion, benefits, backpay and reasonable attorney's fees and costs.

Barjon's attorney submitted a request for attorney's fees and costs in the amount of $14,380.90, encompassing 57.15 hours of attorney time billed at an hourly rate of $250 and costs of $93.40. (Pet. App. C-26 & B-23.) Relying on the U.S. Attorney's Office's assertion that the prevailing rate for attorneys with comparable skills and experience in the Sacramento area was only $185 to $200 per hour, the Secretary issued his final agency decision awarding fees at the rate of $185 to $200 per hour. The decision found the "requested $250 rate . . . simply out of line with rates prevailing in this community." (*Id.*)

Barjon timely appealed the hourly rate issue to the EEOC, which denied Barjon's claim for a $250 hourly rate, but did order the Secretary to pay fees based upon a $200 hourly rate. (Pet. App. C-31.)

Duran

In 1993, Petitioner Lee Duran ("Duran") filed an administrative complaint against the Secretary for discrimination in the failure to promote in his civilian federal employment at MINS. (Pet. App. C-38.) Duran's complaint was settled in 1994 without an admission of wrongdoing by the Navy, but with an agreement for retroactive promotion, backpay, benefits and "payment of reasonable attorney's fees." (Pet. App. C-39.)

Duran's attorney submitted a request for attorney's fees and costs in the amount of $10,249.97, encompassing 40.10 hours of attorney time billed at an hourly rate of $250 and costs of $134.97. (Pet. App. B-23.)

Petitioners' Counsel

Barjon and Duran approached Oakland attorney, Elaine W. Wallace ("Wallace"), and she agreed to represent them in their administrative complaints for employment discrimination at MINS in Vallejo. (Pet. App. D-41, D-46 & D-60.) Barjon and Duran each paid Wallace one dollar to retain her as their attorney of record. (Pet. App. A-8 & D-58.)

They came to Wallace because the number of federal sector discrimination law practitioners in the San Francisco and Sacramento areas is small (Pet. App. D-42, D-46 & D-59) and she is considered an experienced expert in this field. (Pet. App. D-41, D-46 & D-53.) MINS was located in Vallejo, which is geographically closer to Oakland than Sacramento and is considered by the federal government to be part of the San Francisco metropolitan area (rather than the Sacramento metropolitan area) for pay purposes.[2] All actions related to the discrimination claims of Barjon and Duran occurred at MINS

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[2]Civilian federal employees of MINS receive "locality pay" for the San Francisco Bay area at a rate significantly higher than that of civilian federal employees in the Sacramento area. (Pet. App. D-__, D-__ & D-__.)

in Vallejo. (Pet. App. C-25, C-38.) More importantly, a significant portion of the Barjon administrative proceedings activity and Duran settlement negotiations underlying this fee recovery lawsuit occurred in Vallejo, Oakland and San Francisco. All this served as the basis for Wallace's $250 hourly rate requests in Barjon and Duran.

Following the Barjon EEOC decision and the Duran settlement, Wallace submitted to the Navy administrative petitions for fees and costs, asserting her $250 prevailing market rate, but the Secretary refused to pay even the undisputed fees and costs.

District Court Proceedings

On September 1, 1995, Barjon and Duran filed a consolidated complaint against the Secretary in the U.S. District Court for the Eastern District of California in Sacramento. The complaint sought recovery of attorney fees, calculated at an hourly rate of $250, under Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1991.[3] The district court exercised federal question jurisdiction pursuant to 28 U.S.C. Section 1331.

Two weeks later, the Secretary tendered to Wallace a check in the amount of $11,523.40 for payment of the undisputed fees and costs in the Barjon matter. (Pet. App. B-

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[3]*See* 42 U.S.C. Section 2000e, as amended, and 42 U.S.C. Section 1981a, respectively.

23.) On October 11, 1995, the Secretary tendered to Wallace a check in the amount of $8,154.97 for payment of the undisputed fees and costs in Duran. (*Id.*)

The parties filed cross-motions for summary judgment on the issue[4] of Petitioners' counsel's prevailing hourly rate. (Pet. App. B-20.) In support of their motion, Petitioners submitted declarations from numerous attorneys attesting to Wallace's skills and expertise, the general unavailability of Sacramento counsel for these federal sector discrimination claims, and the reasonableness of a $250 hourly rate for either the San Francisco or Sacramento legal communities.

On October 9, 1996, the district court granted the Secretary's motion for summary judgment and denied that of Barjon and Duran. (Pet. App. B-23.) The court observed the general principle that, absent the unavailability of local counsel, awarded fees are calculated according to the hourly rate prevailing in the forum judicial district. (Pet. App. B-21.) Although the court acknowledged that "there are few attorneys who specialize in federal employee discrimination in Sacramento," it found that Petitioners had "offer[ed] insufficient evidence to show that local counsel [was] unavailable in Sacramento." (*Id.*) Because Petitioners had not "persuaded the court that it should look to the prevailing rates in other districts," $200 per hour was deemed to be "a

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[4]Petitioners also requested interest for the delay in payment and reasonable costs for their attorney's law clerk, but the district court never addressed these requests.

reasonable rate" for the Sacramento market. (Pet. App. B-22.)

Barjon and Duran timely appealed this order to the United States Court of Appeals for the Ninth Circuit.

Court of Appeals Review

The court of appeals entered its judgment and order on December 22, 1997 and affirmed the district court's holding that the Sacramento area, rather than the San Francisco area, was the relevant legal community under 42 U.S.C. Section 1988(b) for purposes of calculating Petitioners' attorney's prevailing hourly rate. (Pet. App. A-13.) The appellate court also agreed that "$200 per hour is the appropriate prevailing rate in the Sacramento area." (Pet. App. A-15.)

Because the court could find no precedent squarely on point, the panel rejected Petitioners' contention that the "relevant legal community" should not be limited to a court's judicial district where the boundaries for venue "are not always consistent with the geo-political realities of the local community in which the cause of action arises . . . ." (Pet. App. A-9.) The court concluded: "Without evidence that Sacramento rates preclude attraction of competent counsel, [Petitioners'] argument remains too theoretical to warrant departure from the local forum rule . . . ." (Pet. App. A-11.) Noting the district court had inadvertently conceded the shortage of attorneys who represent federal employees in employment discrimination cases (Pet. App. A-12), the court of appeals still rejected the unavailability of counsel

contention because a few declarants in support of Petitioners' motion for summary judgment "themselves . . . represented plaintiffs like Barjon and Duran previously." (Pet. App. A-13.)[5]

REASONS FOR GRANTING THE WRIT

I.

CONTRARY TO DECISIONS IN OTHER CIRCUITS, THE NINTH CIRCUIT'S DECISION BELOW IGNORED THE REALISTIC AVAILABILITY OF EXPERT *PRO BONO* LEGAL REPRESENTATION FOR THESE PETITIONERS IN LIMITING THE "RELEVANT LEGAL COMMUNITY" TO THE FORUM JUDICIAL DISTRICT.

"The most useful starting point" for determining the amount of a reasonable attorney's fee under 42 U.S.C. Section 1988 "is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). *See City of Riverside v. Rivera*, 477 U.S. 561, 568 (1986). This is the standard

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[5]In addition to the prevailing rate issue, the court of appeals denied Petitioners' enhancement claim (Pet. App. A-16), but found the law clerk costs "justified" by the evidence and instructed the trial court to amend its judgment accordingly. (Pet. App. A-18.)

"lodestar" equation. A reasonable hourly rate "is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895-96 n.11 (1984). The legislative history behind Section 1988 supports this prevailing market rate determination irrespective of whether the litigation is undertaken by *pro bono*, nonprofit or private counsel. *Id. See* Nahmod, *Civil Rights and Civil Liberties Litigation* § 1.25 (2d ed. 1986).

While the *amount* of an attorney's fee award is reviewed for abuse of discretion, "the determination of what constitutes a reasonable hourly rate is a finding of fact subsidiary to the total award and is therefore reviewed under the clearly erroneous standard." *Turner v. Secretary of the Air Force*, 944 F.2d 804, 808 (11th Cir. 1991). *See Smith v. Philadelphia Housing Authority*, 107 F.3d 223, 225 (3rd Cir. 1997) (attorney's marketplace billing rate is a factual question subject to a clearly erroneous standard of review). A closer review is necessary "when the appropriate criteria that are established for a fee award are in question." *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 174 (4th Cir. 1994). "[A]ny elements of legal analysis" which figure into a fee award are reviewable *de novo*. *Schwartz v. Secretary of Health & Human Services*, 73 F.3d 895, 900 (9th Cir. 1995).

A lower court's determination of a prevailing hourly rate under Section 1988 should be reversed where it is based on "an inaccurate view of the law or a clearly erroneous finding of fact." *Corder v. Gates*, 947 F.2d 374, 377 (9th Cir.

1991). *See Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir.), *cert. den.*, ___ U.S. ___, 116 S.Ct. 173 (1995).

Although the attorney fee amounts in dispute in this case are relatively small, the legal principle at stake here is quite great. A realistic definition of the "relevant legal community" for purposes of determining 42 U.S.C. Section 1988(b) prevailing rates is vital if civil rights complainants -- including those represented by *pro bono* counsel -- are to gain equal access to our justice system.

The Ninth Circuit's misapplication of the local forum rule is contrary to decisions in other circuits and clearly erroneous. The court's assessment of available counsel for these Petitioners and their federal sector employment discrimination claims is unrealistic, contrary to decisions in other circuits and clearly erroneous.

This Court should grant this petition and clarify this important federal question of first impression.

A. The Ninth Circuit Misapplied The Local Forum Rule In Defining The Relevant Legal Community Where Significant Contacts With A Neighboring Community Existed.

Citing *Davis v. Macon County*, 927 F.2d 1473, 1488 (9th Cir. 1991), the court of appeals' legal analysis began with a statement of the general rule that the relevant legal community for determining hourly rates is the forum in which

the district court sits. (Pet. App. A-8.) The court of appeals acknowledged that rates from another community could be relevant where local counsel was unavailable "either because they were unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case." (*Id.*)[6]

From there, however, the panel went on to misapply this test by ignoring what Petitioners have described as the "geo-political differences" between where Petitioners' specialized causes of action arose at MINS in Vallejo -- which is closer to the Bay area, where San Francisco rates would be relevant -- and Sacramento, the forum for the fee litigation resulting from arbitrarily drawn lines for judicial district venue purposes. The court concluded that Petitioners' "argument remains too theoretical to warrant departure from the local forum rule given in *Davis*." (Pet. App. A-11.)

Other circuits and courts have more fairly applied the local forum rule consistent with this Court's intent in *Hensley* and *Blum*. The Eighth Circuit has observed that the relevant market for civil rights cases "may extend beyond the local geographic community." *Casey v. City of Cabool*, 12 F.3d 799, 805 (8th Cir. 1993). Although ultimately limiting the out-of-district hourly rate requested by plaintiff's counsel, the *Casey* court reasoned:

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[6]Quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992).

> To limit rates to those prevailing in a local community might have the effect of limiting civil rights enforcement to those communities where the rates are sufficient to attract experienced counsel. Civil rights would be more meaningful, then, in those communities (large cities) where experienced attorneys can command their customary fees.

Id. The court emphasized the "diffuse enforcement" purpose behind the "'private attorneys general' concept" in Section 1988 affirmed by this Court in *Hensley* and *Blum*. *Id.*

The undisputed facts of this case support *Casey*'s inevitable logic and undercut the court of appeals' constricted application of the local forum rule. This error is particularly acute when one considers the following undisputed facts: the Barjon and Duran causes of action arose at MINS in Vallejo, which is considered part of the San FranciscoBay area for pay purposes; Petitioners' counsel met with her clients in Oakland; Petitioners' counsel met with her clients at MINS in Vallejo; Petitioners' counsel conferenced by phone from her office in Oakland to the Secretary's legal department at MINS in Vallejo; the administrative law judge who decided the Barjon complaint conducted the teleconference hearing from an office in San Francisco; the paperwork for the Duran settlement was exchanged in Petitioners' counsel's office in Oakland and another administrative law judge also officed in San Francisco was subsequently advised of the settlement.

The *Davis* local forum rule is not properly applied here, where Petitioners' original causes of action and a significant portion of the underlying legal activity, occurred in closer proximity to the San Francisco area community than the forum community. In *Vaughns v. Board of Education of Prince George's County*, 598 F.Supp. 1262 (D. Md. 1984), the court found that because portions of the countywide school district in a complex desegregation case were closer to Washington, D.C., where plaintiffs' attorneys officed, than to Baltimore, where the court sat, hourly rates from both communities "will be taken into account herein." 598 F.Supp. at 1281. In *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994), another panel from the Ninth Circuit concluded that, despite the Eastern District's venue, San Francisco hourly rates were proper for attorneys' fees incurred in obtaining and even monitoring compliance with a consent decree redressing unconstitutional prison conditions for inmates at the California Medical Facility in Vacaville. 39 F.3d at 1449-1451.

Civil rights litigants are not obligated to "select[] the nearest and cheapest attorney." *Johnson v. University College*, 706 F.2d 1205, 1208 (11th Cir. 1983). The relevant legal community for determining prevailing rates under Section 1988(b) may well include nearby areas from which there are available attorneys to handle complex or controversial civil rights litigation. *Brooks v. Georgia State Board of Elections*, 997 F.2d 857, 869 (11th Cir. 1993) (voting rights).

These precedents reflect a fair application of the local forum rule to special circumstances such as these and would define San Francisco as the relevant legal community for determining Petitioner's counsel's prevailing hourly rate.[7]

B. Expert *Pro Bono* Local Counsel Realistically Was Unavailable To Petitioners In Their Federal Sector Employment Discrimination Cases.

In undertaking Petitioners' representation for only $1 a piece, Elaine Wallace took these federal sector employment discrimination cases "on the come " and, in effect, served as *pro bono* counsel. And she was an expert *pro bono* counsel at that. Petitioners came to her because of her reputation in this specialized field. Even the lower courts agreed that few attorneys with Ms Wallace's skills, experience and reputation were available in Sacramento or San Francisco to litigate these cases. (Pet. App. A-12 & B-21.)

Nevertheless, the court of appeals was impressed that a few attorneys who submitted declarations in support of Petitioners' motion for summary judgment "themselves . . . .

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[7]In addition, the court below was clearly erroneous in finding Petitioners' counsel's prevailing Sacramento rate to be less than $250 an hour for this type of litigation. In a similar employment discrimination complaint against the Secretary of the Navy on behalf of another federal worker, the EEOC recently awarded Petitioners' counsel a fee premised on a $250 hourly rate. (Pet. App. E-66.)

have represented plaintiffs like Barjon and Duran previously." (Pet. App. A-13.)

But that is not the key consideration for determining unavailability in this case. The question is this: Realistically, what was the availability of expert *pro bono* counsel in Vallejo or Sacramento?

In *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169 (4th Cir. 1994), the Fourth Circuit awarded higher hourly rates from a city other than "the community in which the court sits." 31 F.3d at 179. While noting the local forum rule, the *Rum Creek* court outlined two important factors to consider when defining a relevant legal community outside the forum: First, "the complexity and specialized nature of a case may mean no attorney, with the required skills, is available locally." *Id.* Second, the party "choosing the attorney from elsewhere" must nevertheless act reasonably in making the choice. *Id.* The *Rum Creek* court found that both criteria had been met by nonresident counsel.[8]

In constitutional litigation involving South Dakota abortion regulations, the Eighth Circuit, in *Planned*

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[8]The court of appeals attempted to distinguish *Rum Creek*'s analysis by pointing out that it "actually confirmed" the *Davis* local forum rule. (Pet. App. A-10.) Obviously, this begs the question. Petitioners do not argue that this rule should be rejected -- only that it be applied in light of realistic factors like where the causes of action arose, where "geo-political" considerations make sense, where expert counsel office, and where litigation activity actually occurs.

Parenthood, Sioux Falls Clinic v. Miller, 70 F.3d 517 (8th Cir. 1995), upheld higher Chicago hourly rates over South Dakota rates and opined:

> We have no doubt that competent South Dakota lawyers could have handled this case, and handled it well. The lawyers who actually appeared for the plaintiffs, though, do this kind of work routinely. They are leaders in the field of reproductive-rights law. They have extensive experience. . . . We find that a rate higher than $150 an hour is appropriate, and we see no reason to reject plaintiffs' evidence concerning the Chicago market.

70 F.3d at 519. *See Schultz v. Amick*, 955 F.Supp. 1087, 1114 (N.D. Iowa 1997) (because few attorneys statewide are engaged in civil rights litigation on behalf of arrestees and detainees, "the 'relevant' community can reasonably be construed to be all of Iowa"); *Kersch v. Board of County Commissioners*, 851 F.Supp. 1541, 1544 (D. Wyo. 1994) ("totality of conditions" prison reform litigation "requires significant expertise" warranting an out-of-state hourly rate).

Perhaps, just perhaps, there might have been a competent Sacramento attorney available to handle these employment discrimination claims for Barjon and Duran against the Secretary of the United States Navy. But Elaine Wallace "do[es] this kind of work routinely." She is a "leader in the field" of federal sector discrimination law. Petitioners'

decision to go to an attorney referred to them as an expert -- someone willing to challenge the government for them for a buck a piece -- was reasonable under *Rum Creek* and in accord with *Miller*.

Petitioners are entitled to recover attorney fees at the San Francisco community hourly rate of $250 charged by their available counsel.[9] This Court should act to remedy this injustice and clarify federal precedent in this important area of civil rights law.

CONCLUSION

For these compelling reasons, the Court should grant this petition and issue its writ of *certiorari*.

Respectfully submitted,

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[9]The court of appeals also clearly erred in failing to compensate Petitioners for the delay in paying the undisputed fees and costs. *See Missouri v. Jenkins*, ___ U.S. ___, 109 S.Ct. 2463 (1989).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DARNELLA BARJON	)	
and	)	
LEE DURAN,	)	No. 96-17117
	)	D.C. No. CV-95-01598 DFL/JFM
Plaintiffs-Appellants,	)	O R D E R
	)	
v.	)	
	)	
JOHN H. DALTON	)	
SECRETARY OF	)	
THE NAVY,	)	
	)	
Defendant-Appellee.	)	

Before: CHOY, ALARCON AND T.G. NELSON, Circuit Judges.

The panel has voted to deny appellants, petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-17117

DARNELLA BARJON and LEE DURAN,

Plaintiffs-Appellants,

v.

JOHN H. DALTON, SECRETARY OF THE NAVY,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
November 4, 1997--San Francisco, California

Filed December 22, 1997

Before: Herbert Y.C. Choy, Arthur L. Alarcon, and
Thomas G. Nelson, Circuit Judges.

COUNSEL

Elaine W. Wallace, Oakland, California, for the plaintiffs-appellants.

Michael A. Hirst and Mary L. Grad, Assistant United States Attorneys, Sacramento, California, for the defendant-appellee.

OPINION

CHOY, Circuit Judge:

Plaintiffs-Appellants Darnella Barjon ("Barjon") and Lee Duran ("Duran") appeal the grant of summary judgment in favor of Defendant-Appellee John Dalton, Secretary of the Navy ("Secretary"). Appellants claim that the district court erred in denying them additional attorney's fees in excess of those already awarded by the Secretary for attorney Elaine Wallace's ("Wallace") successful work in their administrative proceedings.

Specifically, Barjon and Duran argue that the district court erred in the following respects: 1) defining the relevant legal community as the Sacramento area instead of the San Francisco area; 2) limiting Sacramento's prevailing market rate for employment discrimination cases in 1994 to $200 per

hour; 3) failing to compensate for the delay in payment of fees; and 4) failing to award reasonable law clerk costs.

We AFFIRM the decision of the district court in all respects, except on the issue of law clerk costs which we REVERSE.

Factual and Procedural Background

Darnella Barjon and Lee Duran filed administrative com- plaints against John Dalton, as Secretary of the Navy, alleging discrimination while working for the federal government at Mare Island Naval Shipyard located in the city of Vallejo. Barjon and Duran each paid Elaine Wallace, whose office is located in Oakland, the sum of $1 to serve as attorney in their respective proceedings.

I. Barjon

On March 4, 1993, Barjon filed a formal administrative complaint alleging discrimination on the basis of sex. An Administrative Judge found that Barjon had been subjected to discrimination and recommended her promotion.[1] In a final decision dated April 18, 1994, the Secretary adopted the judge's recommendation. As a prevailing party, Barjon became entitled to an award of reasonable attorney's

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[1]Barjon did not prevail on all issues, but that is not relevant to this appeal.

fees and costs from the Secretary.[2]

As Barjon's counsel, Wallace petitioned for attorney's fees on April 25, 1994. She requested $14,380.90 based on her 57.15 hours (30.4 hours in 1993 and 26.75 hours in 1994) at $250 per hour, plus costs of $93.40. On June 6, 1994, the Secretary rejected Wallace's request and offered an hourly rate of $185-$200 per hour.

Wallace appealed to the Equal Employment Opportunity Commission, Office of Federal Operations ("EEOC-OFO"). But on August 11, 1995, the EEOC-OFO issued a final decision denying Wallace fees in excess of $200 per hour.

Having exhausted all administrative remedies, Wallace filed suit in federal court, in the Sacramento area which is part of the Eastern District of California, on September 1, 1995. On September 14, 1995, the Secretary issued a check for Barjon's undisputed fees and costs in the amount of $11,523.40 based on 57.15 hours at $200 per hour plus $93.40 in costs.

II. Duran

Duran's administrative matter was formalized on

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[2]In this case, the Secretary does not dispute that Appellants are entitled to reasonable attorney's fees; nor does the Secretary dispute the number of hours charged. Rather, the primary dispute is over the appropriate hourly rate to be used in calculating the fee award.

January 22, 1993. On August 17, 1994, Duran and the Secretary entered into a settlement of the administrative complaint, the terms of which included a provision for payment of reasonable attorney's fees.

Accordingly, on August 25, 1994, Wallace petitioned for $10,249.97 based on 40.10 hours (24.75 hours in 1993 and 15.35 hours in 1994) at $250 per hour, 3.60 hours for her law clerk Michael Fried at $25 per hour, plus costs of $134.97. As in the Barjon matter, the Secretary offered only $200 per hour.

On November 28, 1994, Wallace appealed to the EEOC-OFO. But the EEOC-OFO deemed the appeal premature and closed the file without processing the appeal.

On September 1, 1995, Wallace consolidated the Duran matter along with Barjon's case and filed in federal court in the Eastern District of California. On October 11, 1995, the Secretary sent a check to Wallace for the undisputed fees and costs in the amount of $8,154.97 based on 40.10 hours at $200 per hour plus $134.97 in costs. The amount did not include law clerk costs.

III. District Court Proceedings

On August 9, 1996, Barjon and Duran filed a motion for summary judgment requesting the following relief: Attorney's fees based on a $250 hourly rate--instead of the $200 rate awarded by the Secretary for successful work in the administrative proceeding, an enhancement for the delay in

payment of fees, and law clerk costs. On August 23, 1996, the Secretary filed an opposition as well as a cross-motion for summary judgment. On October 9, 1996, the district court denied Barjon and Duran's motion and granted the Secretary's motion for summary judgment.

Specifically, the district court found that Sacramento, not San Francisco, was the relevant market. Furthermore, it found that $200 was the prevailing hourly rate for similar work in the Sacramento area. The district court denied interest for the delay in payment of undisputed fees and did not address the issue of law clerk costs.

On October 21, 1996, Barjon and Duran filed this appeal.

Standard of Review

An appellate court reviews an award of attorney's fees and costs for an abuse of discretion. *Schwarz v. Secretary of Health & Human Services*, 73 F.3d 895, 900 (9th Cir. 1995) (*citing Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). A district court abuses its discretion if its fee award "is based on an inaccurate view of the law or a clearly erroneous finding of fact." *Id. (quoting Corder v. Gates*, 947 F.2d 374, 377 (9th Cir. 1991)).

Analysis

Under 42 U.S.C. S 1988(b), a court has discretion to

award reasonable attorney's fees to the prevailing party in specified cases. Ascertaining a reasonable award is sometimes complicated when a client is not charged his attorney's customary hourly rate. In this case for example, Barjon and Duran each paid Wallace $1 to serve as attorney in their respective proceedings.

[1] But despite the actual fee charged by the attorney, the Supreme Court of the United States has determined that § 1988 attorney's fees are to be calculated according to the "prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). Therefore, the choice of a relevant community and the prevailing rate in that community are crucial to establishing the amount of attorney's fees granted.

We address each of these factors in turn.

I. Relevant Community

[2] Generally, the relevant community is the forum in which the district court sits. *Davis v. Mason County*, 927 F.2d 1473, 1488 (9th Cir. 1991). However, rates outside the forum may be used "if local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case." *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992).

In this case, Wallace filed Barjon and Duran's

complaint with the Eastern District of California. The district court found insufficient evidence that competent local counsel was unavailable. Accordingly, the district court elected to apply the rates of the local forum--the Sacramento area--rather than the rates of Wallace's place of business--the San Francisco area.[3]

A. Application of the Local Forum Rule

Appellants argue that the local forum rule in Davis should not be applied in their case for two reasons--"geo-political realities" and civil rights enforcement.

[3] First, Barjon and Duran contend that the "relevant community" in Davis is geo-politically different than the forum lines drawn for venue purposes. For example, Mare Island, where the cause of action arose, is located in Vallejo which the federal government considers part of the San Francisco, not Sacramento area, for pay purposes. By illustrating how the boundaries for venue are not always consistent with the geo-political realities of the local community in which the cause of action arises, Barjon and Duran assert that the "relevant community" should not be limited to a court's venue.

[4] Unfortunately, Appellants have no legal precedent to support these assertions. They cite *Rum Creek Coal Sales v. Caperton*, 31 F.3d 169 (4th Cir. 1994), as an example in

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[3]Wallace's actual place of business is Oakland.

which the "relevant community" included attorneys a short distance across the edge of the district's venue. However, this Fourth Circuit case actually confirmed Davis in stating "that the community in which the court sits is the first place to look to in evaluating the prevailing market rate." *Rum Creek*, 31 F.3d at 179.

A second basis offered on appeal by Barjon and Duran to deviate from the Davis presumption is facilitating cases of national importance. *See, e.g., Zolfo, Cooper & Co. v. Sunbeam-Oster Co., Inc.*, 50 F.3d 253 (3d Cir. 1995).

In particular, Barjon and Duran assert the importance of ensuring the widespread enforcement of civil rights. They rely on the rationale discussed in *Casey v. City of Cabool, Missouri*, 12 F.3d 799 (8th Cir. 1993).

> The relevant market for attorneys in a matter such as this [S 1983] may extend beyond the local geo-graphic community. A national market or a market for a particular legal specialization may provide the appropriate market. To limit rates to those prevailing in a local community might have the effect of limiting civil rights enforcement to those communities where the rates are sufficient to attract experienced counsel. Civil rights would be more meaningful, then, in those communities (large cities) where experienced attorneys can command their customary fees.

Id. at 805 (quotations omitted).

Although *Casey* is an Eighth Circuit case, we choose to address this argument on its merits not having had an opportunity to do so in prior cases before this court.[4] First, despite the concern in *Casey* over civil rights enforcement, the court of appeals still upheld the district court's award of $150 per hour to plaintiff's attorney rather than his customary rate of $185 per hour. *Casey*, 12 F.3d at 806. Thus, while a consideration for the court, the enforcement factor was not dispositive--allowing the same result reached by the district court in Barjon and Duran's case.

[5] More importantly, in this case, Barjon and Duran have offered no evidence that San Francisco rates are necessary to the enforcement of civil rights cases in Sacramento. Without evidence that Sacramento rates preclude the attraction of competent counsel, their argument remains too theoretical to warrant departure from the local forum rule given in Davis.

B. Unavailability of Local Counsel

Having affirmed use of the local forum rule, we now address whether the district court abused its discretion in

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[4]*See, e.g., Schwarz v. Secretary of Health & Human Services*, 73 F.3d 895, 906-907 (9th Cir. 1995) (declining to address the need for a national market in employment discrimination cases because plaintiff raised the argument for the first time in her reply brief).

holding that Barjon and Duran failed to prove the unavailability of local counsel. We hold that the district court did not abuse its discretion.

Appellants offer declarations attesting to the lack of Sacramento attorneys who represent federal employees in employment discrimination cases. In fact, the district court concedes the shortage.

Nonetheless, the district court refuses to find unavailability for two reasons. First, despite the lack of attorneys in Sacramento, the court notes the similar lack of specialists in San Francisco. Whether or not intended by the district court, this implies that the unavailability of local counsel is not the focus when non-local counsel is relatively limited as well, as if Barjon and Duran must also show that the San Francisco area has several more available counsel than the Sacramento area.

[6] However, we caution that the test in *Gates* does not require an inquiry into the unavailability of counsel outside the local forum. *See Gates*, 987 F.2d at 1405. Rather, plaintiffs must only prove the unavailability of counsel within the local forum in order to justify the use of outside counsel.

The district court's second justification is Barjon and Duran's lack of attempt at retaining Sacramento counsel, as if to require that Appellants prove they solicited local counsel but found them unwilling.

[7] Indeed, Barjon and Duran admit that they never solicited other attorneys before hiring Wallace. However, we clarify that the failure to solicit local counsel is not

necessarily fatal to proving unavailability. In establishing unavailability, *Gates* allows proof of either unwillingness or inability due to lack of experience, expertise, or specialization. There is no requirement that plaintiffs prove both.

[8] In the end though, the district court made the proper finding despite its lack of precision. The evidence suggests the availability of qualified local counsel. The same declarations offered by Appellants to show the unavailability of Sacramento counsel also reveal declarants themselves who have represented plaintiffs like Barjon and Duran previously. Thus, the district court correctly defined the relevant community as the local forum of Sacramento.

II. Prevailing Hourly Rate

[9] Having defined Sacramento as the relevant community, the next inquiry becomes the reasonable hourly rate in the Sacramento area. The established standard is the "rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210-11 (9th Cir. 1986).

In this case, the district court limited Appellants to an hourly rate of $200 instead of their requested rate of $250. We agree with the district court.

[10] Barjon and Duran's evidence of a higher rate is unpersuasive. For example, they present evidence that

several attorneys were awarded rates of $250 in a past case. But evidence that rates as high as $250 have been awarded on one occasion is far from establishing $250 as the prevailing rate in Sacramento.

[11] Furthermore, Barjon and Duran claim their attorney has established her billing rate in Sacramento based on prior work done in the area. But an attorney's prior fee award is not sufficient without other evidence showing that the requested rates are prevailing in the community. "While an attorney's prior fee award may bear on the selection of a reasonable fee in a later case . . . simply offering the prior award is not enough." *Schwarz*, 73 F.3d at 908 (requiring additional proof that the requested rates are in line with other attorneys in the community of similar skill).

As a last attempt, Appellants argue that an attorney's customary billing rate is strong evidence of the prevailing market value. More significantly, they contend that a different average rate in the community should not justify departure from the attorney's customary billing rate. But the only cite provided for this argument is a Seventh Circuit case. *See Gusman v. Unisys Corp.*, 986 F.2d 1146 (7th Cir. 1993).

[12] In Gusman, Judge Easterbrook asserted that *Blum v. Stenson* does not establish a principle of averaging. *Id.* at 1149. However, even if Gusman were binding precedent, the district court in this case did not simply average the rates for all attorneys in the Sacramento area. Rather, the district court considered Wallace's expertise and experience and applied the prevailing rate for similarly qualified local

counsel. This approach is well-established in our circuit. *See White v. City of Richmond*, 713 F.2d 458 (9th Cir. 1983).

[13] In short, we agree that $200 per hour is the appropriate prevailing rate in the Sacramento area.

III. Compensation for Delayed Payment

Even though we refuse to award additional attorney's fees over the prevailing rate in the relevant community, Barjon and Duran still request compensation for the Secretary's delay in payment of undisputed fees. Wallace argues that the right to fees accrued when her clients became prevailing parties-- April 18, 1994 in Barjon's case and August 17, 1994 in Duran's case. Since fees were not paid until September 14, 1995 and October 11, 1995 respectively, Wallace requests an enhancement for the delay.

[14] The Supreme Court has established that an appropriate adjustment for delay in payment of fees is within the contemplation of § 1988. *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989). To that end, the district court may choose to apply either the attorney's current rates to all hours billed or the attorney's historic rates plus interest. *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1305 (9th Cir. 1994).

In this case, the district court denied Appellants any interest on the undisputed fees. Barjon and Duran argue that this constitutes an improper denial of compensation for the delay in payment. We disagree with this interpretation.

[15] The $200 rate awarded to Wallace by the district court adequately compensates her for the delay in payment. First, the $200 rate constitutes the high-end rate prevailing in Sacramento in 1994 for work during January 1993 through August 1994. Wallace received this rate for all hours worked (97.25 hours), even though more than half (55.15 hours) were performed in 1993.

[16] Second, the $200 rate seems reasonable since the delay itself was not very long and the amount of fees not very high. In *Gates*, the court upheld an award for the delay in payment when plaintiffs' attorneys had to wait over three years and their fee totalled millions. But Gates also acknowledged a case which denied compensation for a fourteen-month delay in payment of $8,139 in fees. *See Smith v. Freeman*, 921 F.2d 1120 (10th Cir. 1990). The delay and amount in this case (seventeen-month delay of $11,523.40 in fees for Barjon mat- ter and fourteenth-month delay of $8,154.97 in fees for Duran matter) are very similar to the situation in Smith. Accordingly, we deny Appellants any further compensation for the delay in payment of undisputed fees.

IV. Law Clerk Costs

On appeal, Barjon and Duran argue that the district court improperly ignored their request for law clerk costs as part of attorney's fees. Unfortunately, the district court never even addresses the issue in its order.

The Secretary argues that this issue was never raised below and cannot be raised for the first time on appeal. As a general rule, "an appellate court will not hear an issue raised for the first time on appeal." *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992). However, where the issue "is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed," the court can exercise its discretion and review the issue on appeal. *A-1 Ambulance Service, Inc. v. County of Monterey*, 90 F.3d 333, 339 (9th Cir. 1996) (*quoting Bolker v. C.I.R.*, 760 F.2d 1039, 1042 (9th Cir. 1985). Since the pertinent record has been fully developed on this issue, we exercise our discretion to adjudicate this issue on appeal. *See id.* We find that the record supports an award of law clerk costs.

[17] First, regulations clearly allow for fees, not only for attorneys, but for law clerks as well. *See* 29 C.F.R. S 1614.501(e)(iii). Furthermore, the fee requested here is reasonable. The time records of Wallace's law clerk indicate a total of 60.50 hours worked and an hourly rate of $90. Nonetheless, Wallace requests compensation for only 3.6 hours worked at an hourly rate of $25, presumably to account for her law clerk's lack of experience and expertise.

[18] The 3.6 hours were spent on several tasks, including researching, photocopying, filing, and various conferences. The Secretary presents no evidence to refute that such work was reasonable.

[19] Moreover, there is precedent to support a $25

hourly rate. *See, e.g., Suzuki v. Yuen*, 678 F.2d 761 (9th Cir. 1982). In fact, the Secretary's own declarations evidence much higher rates for law clerks--between $40 and $75 per hour in the Sacramento area.

[20] In short, the amount requested for law clerk costs in this case is justified by the evidence in the record. Therefore, we reverse and instruct the district court to enter an amended judgment awarding Appellants $90 in law clerk costs.

Appellants' request for attorney's fees for this appeal is denied.[5]

No costs allowed.

AFFIRMED-IN-PART and REVERSED-IN-PART.

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[5]Appellants also request that the Secretary be sanctioned for his failure to comply with Circuit Rule 30-1.6 which prohibits duplicative excerpts of record. Since the Secretary's actions do not appear "vexatious," we decline to impose sanctions.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

Darnella Barjon and Lee Duran

v. CASE NUMBER: CIV S-95-1599 DFL JFM

John H. Dalton, Secretary of the Navy

XX--**Decision by the Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 10/9/96.

Jack L. Wagner,
Clerk of the Court

ENTERED: October 9, 1996

by: */s/ G. Knox*
G. Knox, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DARNELLA BARJON and LEE DURAN, Plaintiffs, v. JOHN H. DALTON, SECRETARY OF THE NAVY Defendant.	CIV-S-95-1598 DFL JFM JIM MEMORANDUM OF OPINION AND ORDER

Plaintiffs were prevailing parties in their administrative complaints of discrimination against Mare Island Naval Shipyard and both plaintiffs and defendant now move for summary judgment. The only issue in dispute is the reasonable hourly rate to be applied to the work done by Plaintiffs' counsel. Plaintiffs' counsel argues that her hourly rate should be calculated according to San Francisco market rates; defendants contend that Sacramento rates are proper.

The reasonable hourly rate is determined by "the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation. "Chalmers v. City of Los Angeles, 796 F.2d 1205, 1210-11 (9th Cir. 1986). In this case, plaintiffs' counsel argues that because her place of business is Oakland, California, her rate

should be determined according to San Francisco market rates.[1] The court generally awards fees based on the rate prevailing in the forum judicial district. Davis V. Mason County, 927 F.2d 1473, 1488 (9th Cir. 1991). The court, however, may award fees based on the rates prevailing the attorney's place of practice if local counsel is unavailable either because attorneys are unwilling to take the cases or because they "lack the degree of experience, expertise, or specialization required to handle properly the case." Gates v. Deukmejian, 987 F.2d 1392, 1405(9th Cir. 1992)(citations omitted).

The fee applicant has the burden off proving that out-of-district rates should apply. Hensly v. Eckerhart, 461 U.S. 424, 437 (1983). Plaintiffs' counsel here offers insufficient evidence to show that local counsel is unavailable in Sacramento. She offers the declarations of at least two Sacramento attorneys who have represented federal employees in employment discrimination cases. While it may be true that there are few attorneys who specialize in federal employee employment discrimination in Sacramento, it is apparently true that there are few such specialists in the San Francisco area. Declaration of Clair Earvin-Lee in Support of [Plaintiffs'] Motion for Summary Judgment at ¶ 5 ("Besides Ms. Wallace, Mr. Horowitz is the only attorney I know in

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[1] It is not clear from counsel's submission that Oakland rates are as high as San Francisco rates.

Oakland who represents federal workers."). Furthermore, plaintiffs did not attempt to retain Sacramento counsel. Thus, there is no evidence that competent local counsel was unavailable. Because plaintiff's counsel has not persuaded court that it should look to the prevailing Sacramento rates.

In Ramiro v. Secretary of the Navy S-92-188-WBS/GGH (E.D. Ca.1994), Judge Shubb awarded attorney's fees at the rate of $200 per hour to Victor Thuesen, a lawyer specializing in labor and employment litigation. Mr. Thuesen, like Ms. Wallace, maintains an office in the Northern District of California, and has practiced law in California since the late 1970s. Like Ms. Wallace, Mr. Thuesen is an able advocate. As in Ramiro, plaintiffs' evidence that the prevailing rate for experienced attorneys in employment discrimination cases in Sacramento ranged from $225 to $250 per hour is unpersuasive. Plaintiffs have declarations of one San Francisco attorney and four Sacramento attorneys. Of the four Sacramento attorneys, one charges $200 per hour (Levinson),one charges $225 per hour (Demas, and two charge $250 per hour (Riestenberg and Langenkamp). Langkenkamp's current rate is $250 per hour; in 1994, when the work in this case was completed, her rate was $200 per hour. Declaration of Carolyn Langenkamp in Rafferty v. California, CIV-S-92-177 DFL PAN (E.D. Ca. 1994) Defendant's declarations show that the rates for experienced Sacramento attorneys range from $100 to $200. Thus, $200 per hour is a reasonable rate. Indeed, it is at the high end of the rates charged by experienced litigation

counsel in commercial cases. The rate is appropriate here because Ms. Wallace brings great skill, and experience.

Defendant has already paid plaintiffs' counsel for undisputed fees and costs. On September 11, 1995, defendant issued Wallace a check in the amount off $11,523.40 (57.15 hours in, the Barjon matter at $200 per hour plus $93.40 in costs), and on October 11, 1995 defendant issued Wallace a check in the amount of $8,154.97 (40.10 hours in the Duran matter at $200 per hour plus $134.97 in costs). Plaintiffs do not dispute the calculation of the hours, they just claim they are owed $2,857.50 plus interest because defendant did not pay at $250 per hour. As discussed above, $200 per hour is a reasonable rate. For this reason, plaintiffs are not entitled to any additional attorney's fees or interest for the undisputed fees.

Accordingly,

(1) Plaintiffs' motion for summary judgment is DENIED; and

(2) Defendant's motion for summary judgment is GRANTED.

Judgment shall be entered accordingly.

IT IS SO ORDERED.

Dated: */s/ 8 October 1996*.

/s/ David F. Levi
DAVID F. LEVI
United States District Judge

APPENDIX C

UNITED STATES
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Darnella Barjon,	)	
Appellant,	)	
	)	
v.	)	Appeal No. 01944410
	)	Agency No. DON-93-00221-012
John H. Dalton,	)	Hearing No. 370-93-2035X
Secretary,	)	
Department of the	)	
Navy,	)	
Agency.	)	

DECISION

On June 28, 1994, appellant, through her attorney, appealed to this Commission from the final decision of the agency dated June 6, 1994, concerning an award of attorney's fees and costs. In the underlying case, appellant alleged unlawful employment discrimination bases on sex (female) in violation of Title VII of the Civil Rights Act of 1864, as amended, 42 U.S.C. §2000e et seq. This appeal is accepted by the Commission in accordance with EEOC Order No. 960.001.

ISSUE PRESENTED

The issue presented is whether the agency properly determined the reasonable hourly rate for the attorney's fees to be awarded in this matter.

BACKGROUND

At the time in question, appellant was employed at the agency's Mare Island Naval Shipyard, Vallejo, California facility as a Measurement Equipment Mechanic Foreman, WS-11. On March 4, 1993, appellant filed a formal EEO complaint alleging, among other matters, that she had been subjected to discrimination on the basis of her sex when she was offered placement in a position description different from other similarly situated Training Directors. Appellant's complaint was accepted and investigated by the agency, and ultimately heard before an EEOC Administrative Judge ("AJ"). In her recommended decision, the AJ found that appellant had been subjected to discrimination when she was placed in a position description different from another similarly situated Training Director and not promoted to a permanent WS-14 position when that comparison employee was so promoted. Accordingly, the AJ recommended that appellant be promoted to a permanent WS-14 General Foreman position retroactive to February 1992. The AJ found that appellant failed to establish discrimination with respect to her other allegations. In its final agency decision, the agency adopted the AJ's recommended decision.

Accordingly, the agency awarded appellant a retroactive promotion into a GS-14 position, backpay and attorney's fees. On April 25, 1994, appellant's attorney ("Counsel") submitted a request for attorney's fees and costs in the amount of

$14,380.90, covering attorney time of 57.15 hours at $250.00 per hour ($14,287.50) and costs of $93.40. The request contained an itemized description of the work performance by Counsel by date in tenths of an hour. The agency questioned the hourly rate sought, and on May *24, 1994* ,Counsel filed a declaration stating that she valued her time for services at $250.00 per hour for administrative cases.

On June 6, 1994, the agency issued its final agency decision. The agency found the "requested *$250* [hourly] rate ... simply out of line with the rates prevailing in this community." The decision stated that the U.S. Attorney's Office in Sacramento had determined that the prevailing rate for attorneys with comparable "skill and experience level ... is $185 to $200 per hour." Therefore, the agency awarded "fees ... at the rate of $185 to $200 per hour, plus costs. "[1]

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[1]The final agency decision on attorney's fees also noted that appellant had not prevailed with respect to two of her allegations, which the agency characterized as "the main issue[s]" in her complaint" - both of which concerned appellant's non-promotion to a WS-15 position. Accordingly, the agency stated that is was "entitled to apportionment with respect to hours [and] [b]ased on the 57.15 hours billed by the attorney. However, in its comments on the appeal, the agency abandons its arguments with respect to apportionment and states that is willing to pay $200.00 per hour for all 57.15 hours claimed (i.e. $11,430.00) plus $93.40 in costs, for a total of $11,523.40.

Appellant timely appeals the final decision on the fee request.

In the appeal, Counsel argues that the $250.00 per hour rate is reasonable. In support of this contention, the following declarations are attached: (a) an associate in the Law Offices of Melvin M. Belli declares that Counsel has provided him with legal advice in the past and that, while she did so free of charge, he believes that such services are worth $300.00 per hour; (b) a partner in an Illinois law firm declares that the requested fees of $250.00 per hour are reasonable and within the market range for an attorney of Counsel's high skill, experience and competence; (c) a Sacramento attorney states that his hourly rate is $175.00, but that the more common fee is $225.00 per hour and that he is aware of fees exceeding $300.00 per hour in the larger metropolitan areas. Counsel also notes that in another case involving the agency, a male attorney is requesting that the Federal District Court for the Eastern District of California (the "Court") award him, fees at the rate of $225.00 per hour. Counsel contends that this indicates gender bias on the part of the agency with respect to awards of attorney's fees.[2]

In its comments an the appeal, the agency notes that the relevant community is Solano County, in the Eastern District

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[2]Counsel further notes that the final agency decision on attorney's fees neglected to advise appellant of her right to appeal the fees and costs awarded as required by 29 C.F.R. s1614.501(e) (2) (ii) (A).

of California, which encompasses the Sacramento area. The agency notes that the Court granted fees at the rate of $155.00 per hour in similar discrimination matter, and currently has before it a fee request at the rate of $200.00 per hour. The agency disputes the relevance of the declarations offered by Counsel, contending that: declaration (a) does not purport to state a prevailing rate in any community and further indicates that Counsel was not compensated for the services rendered; declaration (b) is from an Illinois attorney and is "unhelpful" in determining (c) primarily addresses rates in the $175.00 to $225.00 range, rather than the $250.00 rate sought by Counsel. With respect to the male attorney's fee request, the agency notes that the request was still pending before the Court.

ANALYSIS AND FINDINGS

By Federal regulation, an agency shall award attorney's fees and costs for the successful processing of an EEO complaint in accordance with the existing case law and regulatory standards. See 29 C.F.R. §1614.501(d) . The award is normally determined by multiplying the number of hours reasonably expended by a reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424 (1983); Blum v. Stenson, 465 U.S. 836 (1934) ; 29 C.F.R. s1614.501(d) (2) (ii) (B) . The attorney requesting the fee award has the burden of proving, by specific evidence ' entitlement to the requested award.

Copeland v. Marshall, 641 F.2d 830, 892 (D.C. Cir. 1980).[3]

The Supreme Court has held that the reasonable hourly rate for statutory fee cases is to be determined by the "prevailing market rates in the relevant community." Blum v. Stenson, supra, at 895. Most circuits have found that an attorney's customary billing rate for fee-paying clients is the most reliable evidence of the prevailing market rate, provided that rate falls within the bracket of high and low market rates charged by other comparable attorneys for similar work in the same community. See, e.g. Laffey v. Northwest-Airlines, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985); Grendel's Den. Inc. v. Larkin, 749 F.2d 945 (1st Cir. 1934); Cunningham v. - City of McKeesport, 753 F.2d 262, 265-68 (3d Cir. 1985) ; Kelley v. Metropolitan County Bd. of-Education, 773 F.2d 677, 683 (6th Cir. 1935) (en banc), cert. denied, 474 U.S. 1083 (1986).

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[3]After reviewing the record. the Commission finds that no clear error exists in the agency's decision to forego contesting whether appellant is entitled to compensation for all of the hours expended by Counsel despite the failure to prevail on the two allegations concerning appellant's failure to be promoted to a WS-15 position. Appellant achieved significant relief in that she was awarded a retroactive promotion from the WS-11 level to the WS-14 level. Further, the witnesses and evidence utilized with respect to the allegations on which she failed to prevail were also utilized in presenting her successful claim. Accordingly, the Commission finds no reason to disturb the agency's decision to abandon its previous apportionment argument and to conclude instead that all hours expended by Counsel were reasonable.

In the instant case, Counsel submitted a declaration noting that her customary hourly rate for administrative EEO matters is $250.00. She also submits the declarations from other attorneys, as discussed above. In opposition of appellant's request and in support of its decision to compensate her at the rate of $200.00 per hour, the agency cites fee awards in the range of $185.00 to $200.00 per hour and disputes the relevance of the declarations from other attorneys offered by Counsel.

The Commission finds that appellant failed to meet her burden of producing evidence to justify Counsel's claim to the requested hourly rate beyond the mere assertion that $250.00 was Counsel's customary fee. The Commission is unpersuaded that the declarations offered by Counsel establish that the prevailing rate in the applicable area exceed $200.00 per hour. As noted by the agency, declaration (a) indicates that Counsel's services were rendered without expectation of compensation, declaration (b) does not address the relevant community and declaration (c) is from an attorney with a $175.00 hourly fee who merely claims an awareness of higher hourly rates. Such declarations do not provide as useful a guide to setting an appropriate hourly rate as would, for example, declarations from community attorneys with comparable qualifications arresting to the fees they have received for similar work or information on recent fees actually awarded by courts (rather than merely requested from the courts) or through settlement to attorneys of

comparable reputation and experience performing similar work. See National Ass'n of Concerned Veterans, 675 F.2d at 1325; Woods v. Army, EEOC Appeal No. 01940710 (September 20, 1994) ; Douglas v. Department of Air Force, EEOC Request No. 05390186 (January 26, 1989). Based on the record before us, the Commission finds that appellant failed to meet her burden of justifying an hourly rate of $250.00. Accordingly, the Commission affirms the agency's finding that $200.00 per hour is a reasonable hourly rate for all the work done in this case. We will, therefore, order the agency to award appellant attorney's fees at an hourly rate of $200.00.

CONCLUSION

Accordingly, based on a review of the record and for the foregoing reasons, it is the decision of the Commission to MODIFY the agency' final decision and to award appellant attorney's fees as discussed in this opinion and as further set forth in the ORDER below. This matter is REMANDED to the agency for further processing in accordance with this decision and the applicable regulations.[4] Since appellant is

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[4]The final agency decision is also modified due to the agency's abandonment of its arguments in support of reducing the number of compensatable hours and, because the final agency decision on attorney's fees stated that is would pay a rate within the range of $185.00 to $200.00 per hour, rather than setting forth the specific hourly rate.

not a prevailing party for purposes of this appeal, she is not entitled to attorney fees for this appeal.

ORDER

The agency is ORDERED to pay appellant attorney's fees of $11,430.00 representing 57.15 hours of time reasonably expended in support of her complaint and not previously compensated at the hourly rate of $200.00, plus costs of $93.40, within thirty (30) days of the date that this decision becomes final. A copy of the agency's letter to appellant enclosing a check for payment of the determined attorney's fees must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0595)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days off the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy

of all submissions to the appellant. If the agency does not comply with the Commission's order, the appellant may petition the Commission for enforcement of the order. 29 C.F.R. 51614.503 (a). The appellant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §5 1614.408, 1614.409, and 1614.503 (g). Alternatively, the appellant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action. " 29 C.F.R. 55 1614.408 and 1614.409. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. §2000e-16(c) (Supp. V 1993). If the appellant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. §1614.410.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (MO795)

The Commission may, in its discretion, reconsider -the decision in this case if the appellant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or

2. The previous decision involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy; or

3. The decision is of such exceptional nature as to have substantial precedential. implications.

Requests to reconsider, with supporting arguments or evidence, MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS of the date you receive this decision, or WITHIN TWENTY (20) CALENDAR DAYS of the date you receive a timely request to reconsider filed by another party. Any argument in opposition to the request to reconsider or cross request to reconsider MUST be submitted to the Commission and to the requesting party WITHIN TWENTY (20) CALENDAR DAYS of the date you receive the request to reconsider. See 29 C.F.R. 51614.407. All requests and arguments must bear proof of postmark and be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed filed on the date it is received by the Commission.

Failure to file within the time period will result in dismissal

of your request for reconsideration as untimely. If extenuating circumstances have prevented the timely filing of a request for reconsideration, a written statement setting forth the circumstances which caused the delay and any supporting documentation must be submitted with your request for reconsideration. The commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. §1614.604(c).

RIGHT TO FILE A CIVIL ACTION (S0993)

It is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision. You should be aware, however, that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision or to consult an attorney concerning the applicable time period in the jurisdiction in which your action would be filed. If you file a civil action, YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL

NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office facility or department in which you work. If you file a request to reconsider and also file a civil action, filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z1092)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. 5§791, 794(c) . **The grant or denial of the request is within the sole discretion of the Court**. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action")".

FOR THE COMMISSION:

AUG 11 1995
Date

/s/ Ronnie Blumenthal,
Ronnie Blumenthal, Director
Office of Federal Operations
(U.S. Equal Employment Opportunity Commission)

Ser 1130/323
August 17, 1994

Via Fax and Regular Mail
Elaine W. Wallace
Attorney and Counselor at Law
2430 Palmetto Street, Suite 2
Oakland, CA 946O2

Re: Lee Duran v. Secretary of the Navy, EE0C Case No. 370-94-X2656 Agency No. DON-93-00221-009

Dear Ms. Wallace:

This letter confirms our agreement to settle the above-captioned matter. The parties, without admission of any fact in dispute between them and solely to amicably resolve this matter without further litigation, freely agree and stipulate to the terms below.

The agency will take actions with respect to complainant as
follows:

1. Retroactive promotion to the position of Electrician WG-2805-10 as the date of the formal complaint(January 22,1993). His within-grade increases will be granted

retroactive to January of 1993, the time they would normally have been effective.

2. Back pay and entitlements as of the date of the formal complaint.

3. No compensatory damages.

4. Payment of reasonable attorney's fees.

5. Timely processing and support of disability retirement application.

This agreement does not constitute an admission of guilt, fault, or wrongdoing by either party.

This agreement constitutes the complete understanding between the complainant and the agency. No other promises or agreements shall be binding unless signed by both parties.

Both parties agree that the nature and terms of this agreement will remain confidential and that neither shall divulge the nature of terms of this agreement except as ordered in a court or administrative body of competent jurisdiction. The terms will only be disclosed after giving the opposing party notice that the terms are likely to be disclosed so that the other party has an opportunity to respond.

Please sign in the space below to indicate that you approve
of this agreement and fax it back to me.

Sincerely,
/s/ J. Lani Gordon
J. LANI GORDON
Assistant Counsel

Agreed:
/s/ Elaine W. Wallace
Elaine W. Wallace

APPENDIX D

RELEVANT EVIDENCE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DARNELLA BARJON and LEE DURAN,
Plaintiffs,

v.

JOHN H. DALTON, Secretary Department of the Navy,
Defendant.

Case No. CIV-S-95-1598 DFL-JFM

DECLARATION OF DARNELLA C. BARJON

I, DARNELLA C. BARJON, declare under penalty of perjury that if called as a witness I am competent to testify of my own knowledge as follows:

I am the Plaintiff, designated as Darnella Barjon. I was employed at the time of the underlying complaint at Mare Island Naval Shipyard, Vallejo, California. I was employed at Mare Island from 30 October 1973 to the time I accepted a job transfer because of Mare Island's closure status on 22 February 1994. I transferred to Edwards Air Force Base, in the Mojave Desert of California.

Though I had prior discrimination complaints before the case that I hired Ms Wallace for, one case was settled during the informal stage and one was settled by the Shipyard

Commander before the hearing stage. I believed the case about the promotion would not settle at any stage because management kept changing their stories as to why they would not make me a permanent general foreman. I got the distinct impression that I was getting the "run around." For that reason I sought assistance in obtaining an attorney.

During the counseling stage, my counselor was Homer Moore. He told me at any time that I felt I needed legal representation to come in and sign a Mare island form that indicated the name and telephone number of the attorney I would hired. At that time, I discussed with him prior conversations I had with Leslie Whitney, the Federal Women's Program Advisor, and Lois Lawson, my counselor from the prior case, and Meahalani Tolbert, one of the EEO Office staff. I discussed with Mr. Moore that I had heard from these three EEO staff that Elaine Wallace was a good attorney and that she "always won cases against Mare Island." Mr. Moore told me that he knew Ms Wallace, that he had once consulted her about taking his case of discrimination. I asked him if he thought she was honest and Mr. Moore told me that e had consulted with Ms Wallace about his case and that she did not accept his case because she did not believe he had a valid case and could win. Mr. Moore told me that she said that to hire an attorney would be wasting his money. He told me that he did lose his case exactly like Ms. Wallace informed him he would.

I did not talk to other attorneys. I felt that the four recommendations from the Mare Island EEO staff was

sufficient to validate Ms Wallace's qualifications. The EEO staff made it appear to me that there was no other qualified attorney in the world other than Ms Wallace. The EEO staff never talked about any other attorney.

I then tried to find Ms Wallace. I called telephone information and found that she had an unlisted telephone number. I then asked a co-employee, Ray Erck, for the number. He had the telephone number at home. I had some reason to go to Mr. Moore's office and he had Ms Wallace's card. I asked for the card and he gave it to me.

I was never informed that I needed to get bids from different attorneys. I was never informed that I had to get a local attorney who lived or who had their office in Vallejo. I was never informed there was a restriction as to who or where the attorney should work. I was never informed that there was a limit for attorney's fees.

I met with Ms Wallace and she accepted my case. I returned to the EEO office, informed Mr. Moore and Ms Lawson that I had Ms Wallace as my attorney and they stated something to the effect that "Oh, you have Elaine representing you." They smiled and their eyes got big. I remember this so well because Mr. Moore then commented that the Agency was "messing with the wrong lawyer now." He made other very nice comments about Ms Wallace's tenacity. I thought to myself that I had really gotten the hot attorney. Ms Wallace seemed to have their respect as an honest and capable attorney.

During my investigation, I met with the EEO

investigator, Maria Robeshau. Ms Robeshau stated to me that Ms Wallace was a knowledgeable attorney that had other cases that she worked on. She gave me the impression that Ms. Wallace was very well-known in the field of representing federal employees.

During the processing of my compliant of discrimination, I was kept fully informed of all things relating to my complaint. She sent me copies of everything she received or sent out. If I had a question about the procedures or any of the contents of any of the documents, Ms Wallace spent the time with me so that I fully understood what was occurring.

Right after the hearing, the administrative judge suggested that we attempt to settle the case. Ms Wallace tried and tried to reach a settlement. Ms Wallace met with me and came up with all types of different settlement offers but each one was rejected by the Shipyard counsel.

It I needed an attorney again about a federal employment matter I would hire Ms Wallace again because she is honest and would tell me if I had a valid case. She never showed me anything that would indicate that I was treated less than fairly by her office for when I needed information she gave me her attention. I have recommended her to others. I feel that she has a proven track record and is not just an advertisement in the telephone book as someone who is a labor attorney.

I am aware that the Mare Island wage surveys for the blue collar, wage grade employees, were based on the

Oakland Bay Area cost of living. The union uses the Oakland Bay Area to determine he wages and costs of living index for our locality pay. I am ware that Oakland is closer to my home than San Francisco, being approximately 35 miles. I believe that Sacramento is farther way from my home.

Executed on April 13, 1996 at Oakland, California.

/s/ Darnella C. Barjon

DARNELLA C. BARJON, PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DARNELLA BARJON and LEE DURAN,
Plaintiffs,

v.

JOHN H. DALTON, Secretary, Department of the Navy,
Defendant.

Case No. CIV-S-95-1598 DFL-JFM

DECLARATION OF LEE L. DURAN

I, LEE L. DURAN, declare under penalty of perjury that if called as a witness I am competent to testify of my own knowledge as follows:

I am the Plaintiff, designated as Lee Duran. I was employed at the time of the underlying complaint at Mare island Naval Shipyard, Vallejo, California. I was employed at Mare Island from April 1981 to the time I applied for and was granted a disability retirement. The date of my disability retirement is 16 March 1996.

The first time I met Ms. Wallace was because I was being RIFed in 1991. I believed that the RIF was illegal. I went to the union and they stated that they could not help me until I was RIFed. I have a wife who is disabled and a

family. I could not be without a job. I went to the EEO office and they stated they could not help me with filing a complaint because it was a RIF and I was a veteran.

I found out about Ms. Wallace by word of mouth from my Coemployees at Mare Island. I asked around and no one else's name was mentioned as representing federal employees. The people I spoke to would mention Ms. Wallace or said they did not know of a attorney who represented federal employees. An African American supervisor, Leon Cobb, said that Ms Wallace could help me. I cannot pin point the names of others who I spoke to. This was a long time ago and I just cannot remember exactly who I spoke to. I do know and can state with certainty that each person who mentioned Ms Wallace stated that she was a good attorney, she would fight for my rights if she accepted my case, she was efficient, and that she had a good record of helping federal employees.

I did talk to one Napa attorney. I was told that they did not represent federal employees and did not know of anyone who did. Since I had the recommendations of other Mare Island employees, I felt that the recommendations were good enough. I felt that I had the right to pick my attorney. O.J. Simpson got his attorneys from all over. I was never told that I had to find an attorney in Vallejo or Napa. I believed the recommendations from the Mare island employees was sufficient to validate Ms Wallace's qualifications. The recommendations made it appear to me that there was no other qualified attorney other than Ms

Wallace. I was given her card and called her. I gave her card to others who asked me who I had as an attorney. The best recommendation is word of mouth from her other clients I met with Ms Wallace and she helped me. She told me what to get, which forms to use, and how to fill out the forms for my pre-complaint counseling requests. It was at this time that the EEO Office said that they could help me and would take my request for counseling. Without Ms Wallace's help in properly filling out the forms for this pre-complaint counseling as to the RIP, I would have been RIFed. When you are RIFed you are on the outside trying to find a job and trying to fight your case. With her help and without any Pay from me or the government, she helped me negotiate a settlement that rescinded the RIF, received wages of approximately $415.00 of back pay, restored 82 hours of annual leave, and gave me 72 hours of overtime at time and a half, at approximately $22.00 per hour. She did this for no pay from anyone. When I tried to pay her she said she really did very Little and not to worry about it.

When they gave me the settlement agreement for this RIF case, I was told to sign it by the EEO staff I said that I wanted my attorney, Ms Wallace to review it. It was here that it and Cecile Pleman said to me that they would have to re-write then they would fax it to her. They re-wrote the agreement, and there must have been something wrong in it for them to re-write it, faxed it to Ms Wallace, Ms Wallace called me and told me to sign it, and I signed it.

When I had my second case, the case that this

attorney's fees issue is about, I again tried to file a complaint with the EEO Off ice and I did not get any help. They did not want to accept my request for counseling. I called Ms Wallace, she told me what to do, I did it, and the EEO Office accepted my request for counseling. Ms Wallace told me that I should give the EEO office a chance. They settled my first case and I should let them try to settle this one, too. She said that if I was unhappy with what they were doing at the time the case should go formal, I should contact her then.

I retained Ms Wallace for the second discrimination case I had. I had been repeatedly denied promotional opportunities. Promotions meant more money. I knew that I would someday retire and that the retirement was based upon my "high three years.' Ms Wallace was able to negotiate a settlement agreement that gave me a retroactive promotion. I had tried by myself to get this retroactive promotion and I could riot do it. I knew that my only hope was to get an attorney.

I believed thc case about the promotion would not settle at any stage because management kept changing their stories as to why they I was not eligible. One story was that I was not doing the work that I said I was doing. Ms Wallace investigate the information an obtained the necessary documentation and witnesses statements to prove that I was doing what I said I was doing. Because of Ms Wallace I received a retroactive promotion that gave me an approximately $1.50 more per hour. My over time rate was approximately $2.25 more per hour. She also negotiated that

Mare Island would timely process any disability retirement papers. I was aware that mare Island could hold on to papers and keep them somewhere so that it could take months to process any retirement. I believe that the reason my retirement was approved in eight weeks from the time I submitted my retirement package was because Mare island knew that if they did not timely and quickly process the paperwork, Ms Wallace would call them, find out what was taking them extra time, and if the reason was not sufficient, she would file a reprisal complaint.

I obtained Ms Wallace's services because I was not getting any results on my own. My discrimination complaint was not being timely processed. I felt that the EEO office was not, being impartial and trying to take care of the problem at the lowest level.

I met with Ms Wallace and she accepted my case. She contacted the EEO office, and informed them that she was my attorney.

I was never informed that I needed to get bids from different attorneys. I was never informed that I had to get a local attorney who lived or who had their office in Vallejo. I was never informed there was a restriction as to who or where the attorney should work. I was never informed that there was a limit for attorney's fees.

Ms Wallace has the respect as an honest and capable attorney among the employees. Once management knew that I had Ms Wallace for an attorney, I felt that there was a change and the change was in my best interests.

]During the processing of my compliant of discrimination, I was kept fully informed of all things relating to my complaint. She always had time to explain things to me. She sent me copies of everything she received or sent out. If I had a question about the procedures or any of the contents of any of the documents, Ms Wallace spent the time with me so that I fully understood what was occurring. She never put her pocketbook before me.

If I needed an attorney again about a federal employment matter I would hire Ms Wallace again because she is honest and would tell me if I had a valid case. She never showed me anything that would indicate that I was treated less than fairly by her office for when I needed information she gave me her attention. I have recommended her to others. I feel that she has a proven track record and is not just an advertisement in the telephone book as someone who is a labor attorney.

I am aware that the mare island wage surveys for the blue collar, wage grade employees, were based on the Oakland Bay Area cost of living. The union uses the Oakland Bay Area to determine the wages and costs of living index for our locality pay. I am, believe that I am equal distance from Oakland or Sacramento.

Executed on April 17, 1996 at Oakland, California

/s/ Lee L. Duran

LEE L. DURAN, PLAINTIFF

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DARNELLA BARJON and
LEE DURAN,
Plaintiffs,

JOHN H. DALTON.
SECRETARY OF THE NAVY,
Defendant.

Case No. Civ-S-95-1598 DFL/JFM

DECLARATION OF ELAINE W. WALLACE
IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

DATE: 20 September 1996
TIME: 9:00 A.M.

Before the Honorable David F. Levi, Judge
United States District Court for the Eastern District

I, ELAINE W. WALLACE, declare under penalty of perjury that if called as a witness I am competent to testify of my own knowledge as follows:

A. Personal History.

I am an attorney, duly licensed in the State of California, and licensed to practice in the U.S. Courts of Appeals for the Federal and Ninth Circuits, as well as the U.S. District Courts for the Northern and Eastern Districts of California and for the District of Hawaii. I received my license in late December 1977 and began my law practice on 1 January 1978. I have a lifetime credential to teach law from the California Community Colleges.

I have a "Q" clearance from the Department of Energy ["DOE"]. I was a contract employee for DOE and held security clearance hearings. I was paid an hourly and paid within 30 days of the submission of my bill. If the payment was one day late I received interest on the amount. The regulations for security clearances, 10 C.F.R. 710, require that I administer oaths/affirmations, take testimony, rule on objections, write well reasoned recommended decisions. To my knowledge none of my decisions have ever been rejected by DOE. My clearance, I believe, is still in effect.

I began to represent federal employees in 1978 and had my first Equal Employment Opportunity Commission hearing in November 1978. In the years that I have been an attorney, the majority of my practice has been in federal sector personnel law. Over the years I have had a couple of drunk driving cases, a couple of wills, one probate, one trust implementation, and a few other assorted cases. My practice spans the United States. I have or had clients in Texas, Virginia, New Mexico, Massachusetts, Hawaii, Nevada, Washington, California, Kansas, Missouri, and Illinois. I

have had cases against almost all federal agencies including the federal court system.

I have represented federal employees in the administrative process since 1978. I have had more than 1000 administrative hearings before the Equal Employment Opportunity Commission. I have processed more than 490 appeals to the Office of Federal Operations and its predecessor, the Office of Review and Appeals. I have tried over 35 cases in the district court. I have filed over 20 appeals in the Ninth Circuit and have argued over 10 appeals before the Circuit. I have not kept detailed records of these cases. I am using my memory and can list those cases. I am sure that there are others but because I cannot remember them by name I will not count them.

There are not a great deal of classes in federal sector employment law open to the public. For managers and federal agencies, the Office of Personnel Management and some small private companies provide educational opportunities. For the private bar, Public Administration Forum gives one a year or so. I attend these classes [I have also be n as ed to be a guest lecturer for them]. The Merit Systems Protection Board gives a class every year or so. I attend these classes and I have petitioned the State Bar, paying the $25.00 required, to have the Bar grant the Board's classes MCLE credit. The continuing educational opportunities specific to this field of law are limited. I attend classes in related subjects, as federal practice classes.

I am asked to be a guest lecturer for different unions.

I lecture two to three times per year. This year I gave a lecture for the Ventura County Bar Association in representing federal sector employees in the EEO process and lectured for the California American Postal Workers Union with Michael Baldonado, Chief Administrative Judge of the Equal Employment Opportunity Commission's San Francisco District Office on EEO Complaint Processing, advanced course, on 3 August 1996. Presently,. Chief Administrative Judge Baldonado and I have two additional classes scheduled for October 1996, one in San Jose and one in San Francisco. I am not paid one penny for this work. I pay my own travel and hotel.

I have just been requested to act as a mediator for a Department of Army case in Savannah, Georgia, because of my expertise in federal sector EEO complaints processing, knowledge of sexual harassment, and ability to arrive at creative settlements. I volunteered my time and am not being paid anything except actual out of pocket expenses for travel, hotel, transportation to and from the airport, transportation to and from the mediation and reasonable food allowance.

I have increased my rates over the years based upon the real economic world of practicing law. Telephone rates have increased. Paper prices have increased. Postage has increased and we have to send everything by certified mail. return receipt requested, which is an additional fee right now of $2.20 per letter above the actual Postal rates. I now have an office staff of 2 law clerks. one file clerk, one office "go-for," and a bookkeeper. My taxes are detailed and extensive.

Instead of a typewriter I have three computers with CD-roms. I have a copier and a plain paper fax. I have an extensive library of federal practice and discrimination law. For 1995 I made $220,585.00. It cost me approximately $195,593.00 [including depreciation of assets, books and expenses] to keep by office open and to pay the bills.

I have "earned my bones," in this field of law, and am considered by my peers to be an expert. In 1995 alone, I had over 100 Commission cases that either went to hearing, settled, or was decided by motion. I also had cases in district court and before the Merit Systems Protection Board.

B. Office Practices of Timekeeping.

It is the office practice to keep time records immediately as a task is performed. My telephone has a clock built in. When someone picks up the telephone, the clock automatically begins and when we hang up, the clock stops. It informs us how many minutes we spend on the telephone. I take contemporaneous notes of telephone conversations and indicate the time right on the document. When I have an in person conference, I use the clock on the wall to account for my time. When I receive or write a letter I make a note of the time expended for this task. If I perform copying, my copy machine has a counter and I note the number of copies in the file. I keep records of mailings that are more than one ounce [$0.32].

I use good business judgment when I perform the

final review of my time records. I have been known to discount my time. To determine the discount, I review each and every time record and charge. I have a timer on my telephone. It starts from the time I dial the number to the time I hang up. I review the time when I hang up the telephone. If I talk about other matters or other things, I consider that when I write down my time. When I review a letter that I have received, it depends on the letter and what I need to do. When I write a letter the same review occurs. When I do research, if the research has been previously used and it is a "cut and paste," I use only the actual time I spend to take the information from one disk to another or to find the research. If I use the computer to research, it is timed by the research service. If I send a few page letter to my client I do not charge copying costs even though I could. I do not charge for normal postage. I do charge for certified return receipt postage and have records for that charge. I do not charge for sending or receiving faxes. When I complete the time records I again review them and consider if the amount is excessive to me. If it is excessive I again go back and review each record over one half an hour to the document to ensure that the time is accurate. All of this takes more time and this is compensable time. I then consider how the agency attorney/representative or the Assistant US Attorney responded or acted during the process. Were they agreeable? Did they readily provide information or was it a fight to get the minimum of information? How much extra work did I have to do to get to the same goal? This might sound silly,

but the conduct of the opposing counsel/representative is very important in these types of cases because they come around again and again in other cases. Do I need to appeal something because the agency wants to play "hardball" and wants to delay the case? Does the agency want to settle more than one case using the "global settlement" posture or do they only want to settle the case at hand? The more vexatious and rude the attorney/representative is, the more disinclined I am to discount my fees and costs.

In the Barjon and Duran case, I did not include all of the time that I spent with Ms. Vermeersch even though I believe that it is compensable time. The reason for this is that I was ill and really did not want to expend that much energy at the time I needed to conserve it.

Because I and my office staff have better things to do that input these time records daily into the computer, we keep a log. We use this log to prepare the time records for submission with a fee petition if the parties do not agree to a lump sum payment.

C. Records in this Case.

I used the standard office procedures as described above to keep time records in this case. My review of the records followed those procedures. The records are true summaries of the documents in my possession. I followed my standard office procedures when I decided what hours I would submit for payment with my original fee petition and

with the time records that I submit with this motion.

D. Who Pays Me?

Mr. Duran paid me one dollar. Until the time that I assisted him with the preparation of his Declaration in Support of this Motion for Summary Judgment, I had completely forgotten that I had assisted him with a prior matter. The few meetings we had were uneventful and remarkable. Because it was minor I did not even charge him a dollar for the assistance I provided him.

Ms Barjon paid me one dollar. This was the only case I represented her on. I had never asked her why she came to me in the first place and did not know until the time I assisted her with her Declaration that I was recommended to her by MINS' EEO staff.

I informed them at the time they retained me that their obligation for fees would be limited to the one dollar that they paid me at the time they retained me.

I am personally aware that the number of attorneys who solely represent federal employees is very small. Because of this case, I have had to spend a extra ordinary amount of time contacting attorneys to obtain the names of other attorneys to find out who practices federal sector EEO. I have met a new group of attorneys who represent employees but I have still to meet someone who represents only federal employees like I do. Many of the attorneys stated that they have had one or two cases and they have all commenced

about the archaic maze for federal employees which must be exhausted before a court action is filed. I know that there are a few attorneys who accept federal employees once or twice but become discouraged, for example: Attorney Horowitz and Attorney Earvin-Lee only accept one case at a time. Other attorneys, like Attorney Gwilliam and Attorney Adler, do not accept federal employees because of the administrative process that must be exhausted prior to filing in court. I have been calling other attorneys I know who have a number of federal employees cases, and I have been informed that David Handsher is paid close to $300.00 per hour, Ray Lang is paid $295.00, Minami Lew, Tamaki and Lee are paid a minimum of $300.00 per hour. Mr. Demas informed me that his rate is $225.00 to $250.00 and that is very reasonable considering the lack of qualified attorneys in this area. I have asked each attorney to provide me with a declaration as to their fees and how they feel about federal sector cases. I have received a few.

On August 7, 1996 I received a list of attorneys who practice before the Commission. Exhibit 13. I contacted many of them and my notes taken while I spoke to them indicate that of those that I contacted, the majority do not take federal employees as clients. I have asked those I spoke to for a declaration.

I am also aware that many federal employees cannot pay the normal hourly rate of attorneys whether it is $ 175.00 to $ 300.00 per hour. Many of the clients have been removed or suspended. They have no money. Those clients I chose

to take are taken "on the cuff" and are charged $1.00. Many of these people would not be able to obtain competent counsel for their cases if they had to pay a $5,000.00 retainer. Many of my cases in California are in areas where there may be an employer defense firm such as the Littler office or other attorneys, but Littler represents employers and the other attorneys just cannot get up to speed with the bureaucratic maze of federal personnel law.

For Duran and Barjon, if I did not prevail with a finding of a right for attorney's fees or settle the case with a right for attorney's fees, my clients would not be required to pay me costs or fees. My receipt of attorneys fees is solely based on whether the agency pays or not. I assume all the risks. I did not mitigate the risk of non-payment by requesting a portion of the back pay award or a percentage of a number of years of future pay. The only contribution by the client was one dollar. There is a reason for each being charged only one dollar. For Duran, he is the sole support of his family and his wife is disabled. For Barjon, I am very concerned about women in non-traditional female work positions and in blue dollar trades. I do not promise my clients that I will prevail or that I will settle the case with an award of fees. I am aware that the government, especially MINS, felt that they would and should prevail in the administrative process. Barjon as an example: my attempts to settle after the initial recommended decision until the final agency decision.

I admit that I did not ask plaintiffs about their personal

travails in a search of an attorney. It was only recently that I obtained a statement from them about why they came me rather than a local or Sacramento attorney.

D. My Reasonable Hourly Rate.

I have received between $250.00 and $275.00 per hour in 1995 for cases that I worked on. For example in Powell v. PMG, I received $250.00 for each and every hour submitted; in Bonner v. PMG and Hudson v. PMG I received $275.00 per hour for each and every hour I submitted. Bonner and Hudson are cases that I would consider as "Sacramento cases" because the Postal Labor Relations Office in West Sacramento were the employer's advocates for the cases. Powell was in Bakersfield, which is part of the Eastern District for jurisdictional purposes. The difference in the rate is because Powell was in the beginning of 1995 and Bonner and Hudson were in late 1995. My present hourly rate is $300.00.

I have settled cases in the administrative process and in court. We have negotiated the attorney's fees and costs. Part of each of the settlement agreements have a confidentiality clause and a non-precedential use clause requested by the US Attorney's Office or the agency. I believe that I would be breaching their confidence in me if I disclosed the terms of a bargained for agreed to amount. I offered the US Attorney's Office full disclosure of these cases if they would provide me with a release and hold harmless

agreement, and agree that the time I spend obtaining the documents is compensable time. This offer was not accepted. Further, since a bargained for portion of the settlement is that the attorney fees amount is non-precedential in nature, I believe that I am not permitted to use that information. I am concerned that the federal agency will then consider the agreement voidable and we would have a disagreement.

E. Similar Attorneys and Their Rates.

I wrote to three county bar associations. I received some telephone calls in response to my question about the "Sacramento rate" of $200.00 per hour. I contacted other attorneys I personally know actively practice employment rights cases. As indicated in the Earvin-Lee Declaration, there are very few attorneys who regularly represent federal employees.

I have declarations from other attorneys, and are submitting them in support of this motion.

F. Research into the Differences Between San Francisco Bay Area and Sacramento to Permit a Lower Rate.

I was informed that there is a "Sacramento rate" of $200-00 per hour for Title VII/civil rights matters. I then began a search for the study that is the basis for this "Sacramento rate." I sent a law clerk to the clerk's office to

obtain a copy of the study. I was told there is no such study. I had a law clerk use Premise, the West Publishing CD for Federal Reporters and Federal Supplements, to seek out each and every case that is published about attorney's fees in the Eastern District and those appealed to the Ninth Circuit which mention this "Sacramento rate." We found only one. I have legal publications just on attorney's fees, some published by Shepherd's, Clark Boardman, and others. I hand searched the BNA's Federal Employment Practice Cases. Other than the one case that speaks about the "Sacramento rate," I can find no other information. I even requested during discovery from the US Attorney if they had this study that substantiates the $200.00 "Sacramento rate." They do not have the study.

I contact the U.S. Postal Service and asked if Sacramento has a lower rate for postage. The answer, after a great deal of laughter, was no. Sacramento, Oakland, and every other city in the United States is charged the same rates. I contacted AT&T, my long distance telephone service, and asked if there were different rates for different areas of the state. Again, the answer was no. I contacted Office Club to find out if they charged different rates in their Sacramento and Oakland stores. The answer was no. The cost of doing business is the same, except if the purchaser is a governmental agency or a large corporation that can bargain for better rates on supplies because of the volume of supplies purchased. For everyone else paper supplies, stamps, phones, everything is the same.

I researched the pay rates for the San Francisco and

the Vallejo areas. I found out that the Vallejo area, where MINS was situated, is considered by the federal government for pay purposes part of the San Francisco area and federal agencies in Vallejo, like Oakland, have an 8.14% locality pay added to their base salary. In January 1995, Sacramento, on the other hand, has a 5.27% locality pay. It went up in 1995 from the 1993 rate of 3.55%. This means that federal employees who work in Sacramento are paid only a little less than those who work in Oakland.

Using the government's logic, the difference between the San Francisco Attorneys who receive $300.00 and the Sacramento attorneys who receive this "mythical" $200.00 rate is $100.00 while it should only be $18.00. Therefore, Sacramento attorneys should receive $282.00 per hour.

I have asked the government for the basis for this $200.00 cap on fees, and have no real response. It is that the government wants to litigate this matter because the determination of this case on attorney's fees and costs will set the standard for other cases. This position makes this case important to all employment law attorneys. This is the reason why I and my office staff have spent an inordinate amount of time contacting other attorneys to obtain declarations in support of my claim for reasonable attorney's fees. This litigation is now taking on more than just secondary litigation to the underlying matters. I have been paid more than the $200.00 "Sacramento rate."

Since the time I filed my original petitions for attorney's fees and costs, I have expended additional time and

costs. My time and costs sheet is attached. Exhibit 16.

Executed on 8 August 1996 at Oakland, California.

/s/ Elaine W. Wallace
ELAINE W. WALLACE, ESQ.
ATTORNEY FOR PLAINTIFFS

APPENDIX E

RELEVANT CASES

Fred Chan,
Appellant,

v.

Appeal No. 01953004
Agency No. 94-00221-005

John H. Dalton,
Secretary,
U.S. Department
of the Navy,
Agency.

DECISION

Appellant, by and through his representative, timely appealed to the Equal Employment Opportunity Commission (commission) concerning an award of attorney's fees and costs. In the underlying case, appellant alleged unlawful employment discrimination based on reprisal (prior EEO activity) in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §2000e et seq. The appeal is accepted in accordance with the provisions of EEOC Order No. 960.001.

This appeal arises from the agency's failure to respond to appellant's representative's verified statement of costs and attorney's fees (dated August 20, 1994), as required in the settlement agreement between appellant and the agency which was entered into on August, 3, 1994. The agreement allowed

for an appeal to the EEOC if the representative was not satisfied with the agency's decision regarding attorneys fees. The agreement further indicated that the Commission's decision would be binding on both parties. Due to the fact that three years have transpired since the agreement, and the agency has not responded to the representative or submitted any statement to the EEOC on appeal, we consider the agency's silence as its final decision rejecting the representatives petition for attorney's fees and costs.

The issue presented is whether the hourly rate, amount of hours expended, and the attorney's fees and costs submitted by the representative are reasonable and should be paid by the agency.

At the time of the complaint, appellant was employed as an Environmental Engineer, GS-830-12. Believing he was a victim of discrimination, appellant sought EEO counseling and, subsequently, filed a formal complaint an November 9, 1993, wherein he alleged that he was discriminated against on the basis of reprisal when he was not allowed to meet with his EEO representative. The agency conducted an investigation, during which it entered into a settlement agreement, the provisions of which allowed appellant to petition for reasonable attorney's fees.

Our regulations provide that an agency shall award attorney's fees and costs for the successful processing of an EEO

complaint. 29 C.F.R. §1614.501(e). Attorney's fee awards are also available to appellants who enter into settlement agreements. See Eglin v.United States Postal Service. EEOC Request No. 05910604 (August 22,1991). The award is determined by multiplying the number of hours reasonably expended by a reasonable hourly rate, also known as a lodestar. Hensley v. Eckerhart, 461 U.S. 424 (1983); Blum v.Stenson, 465 U.S. 886 (1984); 29 C.F.R. §1614.501(e)(2)(ii)(B). The burden of proving entitlement is an the attorney requesting the award. Copelend v. Marshall, 641 F.2nd 880, 892 (D.C. Cir. 1980).

The Supreme Court has held that the reasonable hourly rate for statutory fee cases is determined by the "prevailing market rates in the relevant community." Blum, 465 U.S. at 895; see also Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169 (4th Cir. 1994). In addition to the attorney's own affidavit, satisfactory evidence must be presented that the requested rate is consistent with those in the community for services by attorneys with comparable skill, experience, and reputation. Blum, 465 U.S. at 895-96 n. 11.

The representative's petition for fees consists of her affidavit; a time chart outlining the time expended in the case; her law clerk's time chart; four affidavits from attorneys attesting to the representative's skill, reputation and the reasonableness of the rate ($250.00 hourly) requested; and other supporting documents. We have reviewed the petition and the agency's

complaint file and find that the representative has met her burden of demonstrating that the $3,567.53 fee is reasonable.[5] We further find that the representative is entitled to interest on that amount beginning from September 20, 1994, until the date the agency pays the award.[6] §114 Civil Rights Act of 1991.

Therefore, after a careful review of the record, including the petition for fees, the supporting documents, and arguments and evidence not specifically addressed in this decision, the Commission orders the agency to take the action set forth in the Order below

ORDER (C1092)

The agency is ORDERED to take the following remedial action:

1. The agency is ordered to compute interest an the attorney's fee award of $3,567.53. The period during which

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[5]The total is based on a $250.00 hourly rate for 13.55 hours spent an the case by the representative ($3,387.50), 6 hours at a $25.00 hourly rate for her law clerk ($150.00) and $30.03 in costs.

[6]Appellant I s petition is dated August 2 0, 19 9 4. We f ind that the agency should have responded to the petition within thirty (30) days. consequently, interest is to he calculated from September 20, 1994, until the fee is paid.

interest has accrued shall be deemed to run from September 20, 1994, until the date the award is paid.

2. The agency shall, within thirty (30) days of receipt of this decision, issue a check to the representative for the appropriate amount of the fee, plus interest.

3. The agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

IMPLEMENTATION OF THE COMMISSION'S DECISION (KO595)

Compliance with the Commission's corrective action is mandatory.

The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the appellant. If the agency does not comply with the Commission's order, the appellant may petition the Commission for enforcement of the order. 29 C.F.R.

§1614.503 (a). The appellant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.408, 1614.409, and 1614.503 (g). Alternatively, the appellant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action." 29 C.F.R. §§ 1614.408 and 1614.409. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. §2000e-16(c) (Supp. V 1993). If the appellant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. §1614.410.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0795)

The Commission may, in its discretion, reconsider, the decision in this case if the appellant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or

2. The previous decision involved an erroneous interpretation of law, regulation or material

fact, or misapplication of established policy; or

3. The decision is of such exceptional nature as to have substantial precedential implications.

Requests to reconsider, with supporting arguments or evidence, MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS of the date you receive this decision, or WITHIN TWENTY (20) CALENDAR DAYS of the date you receive a timely request to reconsider filed by another party. Any argument in opposition to the request to reconsider or cross request to reconsider MUST be submitted to the Commission and to the requesting party WITHIN TWENTY (20) CALENDAR DAYS of the date you receive the request to reconsider. See 29 C.F.R. §1614.407. All requests and arguments must bear proof of postmark and be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed filed on the date it is received by the commission.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely. If extenuating circumstances have prevented the timely filing of a request for reconsideration, a written statement setting forth the circumstances which caused the delay and any supporting

documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration tiled after the deadline only in very limited circumstances. See 29 C.F.R. §1614.604(c).

RIGHT TO FILE A CIVIL ACTION (R0993)

This is a decision requiring the agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court. It is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90)CALENDAR DAYS from the date that you receive this decision. You should be aware, however, that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it from the date that you receive this decision or to consult an attorney concerning the applicable time period in the Jurisdiction in which your action would be filed. In the alternative, you may file a civil action AFTER ONE HUNDRED AND EIGHTY (180) CALENDAR DAYS of the date you filed your complaint with the agency, or filed your appeal with the commission. If you file a civil action, **YOU MUST NAME AS THE DEFENDANT IN THE**

COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court. "Agency" or "department", means the national organization, and not the local office, facility or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z1092)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION

/s/ Ronnie Blumenthal
Ronnie Blumenthal, Director
Office of Federal Operations

/s/ Aug 21 1997
Date

(U. S. Equal Employment Opportunity Commission)

FILED
AUG 24 1998

No. 97-2073

In the Supreme Court of the United States

OCTOBER TERM, 1997

DARNELLA BARJON AND LEE DURAN, PETITIONERS

v.

JOHN H. DALTON, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in the calculation of attorney's fees under 42 U.S.C. 1988(b) by basing the hourly rate for counsel on the prevailing market rate in the Eastern District of California, the forum in which petitioners' claim arose and in which their complaint was filed, rather than on the market rate in the San Francisco area, where petitioners' counsel was located.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A18) is reported at 132 F.3d 496. The opinion of the district court (Pet. App. B20-B23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1997. A petition for rehearing was denied on March 3, 1998. Pet. App. A1. The petition for a writ of certiorari was filed on June 1, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners were federal, civilian employees at the Mare Island Naval Shipyard (MINS) in Vallejo, California. In 1993, they filed administrative complaints

against the Secretary of the Navy, alleging wrongful discrimination in the employment context. Pet. App. A4-A6.

All employment actions relating to petitioners' discrimination claims occurred at MINS, which is in the Eastern District of California; the administrative complaint also was filed in the Eastern District; and a significant portion of the administrative proceedings took place in the Eastern District as well. Petitioners, however, retained an Oakland attorney, Elaine Wallace, to represent them, and many administrative proceedings were conducted in Oakland and San Francisco, which are in the Northern District of California. In 1994, after achieving favorable administrative outcomes, petitioners became entitled to reasonable attorney's fees. Pet. App. A4-A6.

The Navy did not challenge the number of hours claimed in petitioners' request for attorney's fees. The Navy determined, however, that the $250 hourly rate requested by petitioners based on their attorney's place of practice—the San Francisco area—was out of line with prevailing rates in the Eastern District of California and in Sacramento, the district where petitioners' causes of action arose and where qualified attorneys were available to represent petitioners. The Navy determined that $200 per hour was a reasonable hourly rate for a Sacramento attorney similarly situated to petitioners' counsel. Pet. App. A6-A7.

2. Petitioners filed a consolidated complaint against the Navy in the Eastern District of California in Sacramento, arguing that their attorney's hourly rate should be calculated according to the San Francisco market rate of $250 per hour, not the Sacramento rate of $200 per hour. Pet. App. A6-A7, B20. Petitioners argued that where, as here, the community in which the

cause of action arose and the majority of the administrative action occurred (*i.e.*, Vallejo) is on the edge of a judicial district, and where that community has closer geo-political contacts with an out-of-district attorney's place of practice (*i.e.*, San Francisco) than the judicial district (*i.e.*, Sacramento), the relevant community should not be limited to the district court's venue. *Id.* at A9.

The district court disagreed. It observed that, consistent with Ninth Circuit precedent, it generally awards fees based on the rate prevailing in the forum judicial district. Pet. App. B21 (citing *Davis* v. *Mason County*, 927 F.2d 1473, 1488 (9th Cir.), cert. denied, 502 U.S. 899 (1991)). However, it retains discretion to award fees based on the rates prevailing in an out-of-district attorney's place of practice if local counsel are unavailable either because "attorneys are unwilling to take the cases or because they 'lack the degree of experience, expertise, or specialization required to handle properly the case.'" Pet. App. B21 (quoting *Gates* v. *Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992)).

The burden is on the fee applicant to prove that out-of-district rates should apply, and the court found that petitioners failed to carry that burden. Pet. App. B21. The evidence submitted by petitioners pointed in the opposite direction, because several declarations offered by petitioners to show the unavailability of Sacramento counsel revealed that the declarants themselves had previously represented plaintiffs who were similarly situated to petitioners. *Ibid.* The court therefore granted the Navy's motion for summary judgment. *Id.* at B23.

3. The court of appeals affirmed in relevant part, holding that the district court did not abuse its

discretion in calculating the fee award. As relevant here, the court held that neither precedent nor policy compelled grafting a "geo-political" contacts component onto the local forum rule. Pet. App. A8-A10. Petitioners "offered no evidence that San Francisco rates are necessary to the enforcement of civil rights cases in Sacramento. Without evidence that Sacramento rates preclude the attraction of competent counsel, their argument remains too theoretical to warrant departure from the local forum rule." *Id.* at A11. Moreover, record evidence showed that qualified Sacramento counsel were available to represent petitioners. *Id.* at A13.

The court of appeals denied petitioners' request for rehearing and suggestion of rehearing en banc. Pet. App. A1.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or with any decision of the courts of appeals. This Court's review is therefore not warranted.

1. Under this Court's precedents, federal courts calculating attorney's fees pursuant to 42 U.S.C. 1988 should use the "prevailing market rates in the relevant community." *Blum* v. *Stenson*, 465 U.S. 886, 895 (1984). In all but exceptional cases, identifying the "relevant community" is not problematic. The attorney representing the prevailing plaintiff usually practices in the community in which the suit is brought. In such a case, there is only one obvious choice for the "relevant community"—the community in which the suit is filed and from which counsel hails.

The "relevant community" becomes a litigable issue only where, as here, an out-of-district attorney handles a lawsuit. In such cases, courts follow what is known as the "local forum" rule. Under that rule, the district court presumes that the forum in which it sits is the relevant community. The justification for this presumption is that, if counsel are available in the local forum, "the fee opponent should not be required to pay the higher rates of * * * counsel from out-of-town." 2 M. Derfner & A. Wolf, *Court Awarded Attorney Fees*, ¶ 16.03[8] at 16-103 (1997). Nonetheless, where the justification underlying the local forum rule is absent—that is, in circumstances where local counsel are not available, or local counsel lack the special skills required to litigate a particular case—the court retains discretion to apply the prevailing market rate of a different community. Thus, a district court may look to market rates outside its jurisdiction "where the plaintiffs [prove] that local counsel * * * [were] unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case." *Schwarz* v. *Secretary of HHS*, 73 F.3d 895, 907 (9th Cir. 1995) (internal quotation marks omitted).

The local forum rule is uniformly followed by courts of appeals,[1] and with good reason. It is easily adminis-

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[1] Derfner & Wolf, *supra*, ¶ 16.03[8], at 16-101; see, *e.g.*, *Schwarz*, 73 F.3d at 906-907; *Public Interest Research Group* v. *Windall*, 51 F.3d 1179, 1186-1187 (3rd Cir. 1995); *TCBY Sys., Inc.* v. *RSP Co.*, 33 F.3d 925, 931 (8th Cir. 1994); *Brooks* v. *Georgia State Bd. of Elections*, 997 F.2d 857, 868 (11th Cir. 1993); *National Wildlife Fed'n* v. *Hanson*, 859 F.2d 313, 317 (4th Cir. 1988); *Polk* v. *New York State Dep't of Correctional Servs.*, 722 F.2d 23, 25 (2d Cir. 1983); *Louisville Black Police Officers Org.* v. *City of Louisville*, 700 F.2d 268, 277-278 (6th Cir. 1983); *Maceira* v. *Pagan*,

tered and predictable, which eases the burden on district courts and prevents the "request for attorney's fees [from becoming] a second major litigation," *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983).[2] It is neutral, favoring neither plaintiffs nor defendants.[3] And it is sufficiently flexible to ensure fairness, because the district court always retains discretion to consider the specific litigation needs of plaintiffs—such as the absence of qualified local counsel, or other factors making it necessary to obtain out-of-district counsel—

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698 F.2d 38, 40 (1st Cir. 1983); *Donnell* v. *United States*, 682 F.2d 240, 251-252 (D.C. Cir. 1982), cert. denied, 459 U.S. 1204 (1983); *Chrapliwy* v. *Uniroyal, Inc.*, 670 F.2d 760, 768 (7th Cir. 1982), cert. denied, 461 U.S. 956 (1983).

[2] The district court simply applies the prevailing market rates within its jurisdiction—a matter about which it generally has developed some expertise. *Donnell*, 682 F.2d at 251.

[3] "High-priced attorneys coming into a jurisdiction in which market rates are lower will have to accept those lower rates for litigation performed there. Similarly, some attorneys may receive fees based on rates higher than they normally command if those higher rates are the norm for the jurisdiction in which the suit was litigated." *Donnell*, 682 F.2d at 251-252; see also Derfner & Wolf, *supra*, ¶ 16.03[8], at 16-103 (pursuant to local forum rule, where out-of-town counsel's customary rates are lower than prevailing market rate in local jurisdiction, "out-of-town counsel can recover the higher forum rate"); *Public Interest Research Group*, 51 F.3d at 1186, 1187 ("Plaintiffs should not be penalized for retaining counsel of their choice, but neither should they be permitted to impose additional costs on defendants for plaintiffs' decision to go outside the district when ample competent local counsel were available." As a result, "an out-of-town lawyer would receive not the hourly rate prescribed by his district but rather the hourly rate prevailing in the forum in which the litigation is lodged. Deviation from this rule should be permitted only when the need for 'the special expertise of counsel from a distant district' is shown or when local counsel are unwilling to handle the case.").

on a case by case basis. *Schwarz*, 73 F.3d at 907; *Donnell* v. *United States*, 682 F.2d 240, 252 (D.C. Cir. 1982), cert. denied, 459 U.S. 1204 (1983); Derfner & Wolf, *supra*, ¶ 1603[8], at 16-103 to 16-104. Accordingly, at least one judicial task force has concluded that the local forum rule not only is the uniform choice of appellate courts, but also is the "best rule." *Public Interest Research Group* v. *Windall*, 51 F.3d 1179, 1186 (3rd Cir. 1995).

2. Petitioners do not appear to challenge the local forum rule directly, but rather seem to request its revision with respect to cases where, as here, the cause of action arises near the border of a judicial district. In such cases, they argue, the "relevant * * * community" should be the neighboring community in which out-of-district counsel practices, so long as there is a sufficiently close "geo-political" connection between the community where the cause of action arose and the community from which out-of-district counsel hails. See Pet. 10-11.

a. Petitioners, however, "have no legal precedent to support" revising the local forum rule in the manner they request. Pet. App. A9. Indeed, contrary to petitioners' contentions, no other circuit has adopted the "geo-political realities" test they propose.

The decision in *Rum Creek Coal Sales, Inc.* v. *Caperton*, 31 F.3d 169 (4th Cir. 1994) (cited Pet. 15), for example, "actually confirmed [the local forum rule] in stating 'that the community in which the court sits is the first place to look to in evaluating the prevailing market rate.'" Pet. App. A10 (quoting *Rum Creek*, 31 F.3d at 179). And, although the court in *Rum Creek* approved the use of out-of-district rates in part, it carefully justified that result by reference to one of the exceptions to the local forum rule—the unavailability of

willing local counsel. As the court explained, the plaintiff there made "a persuasive argument that it was necessary to use [out-of-district counsel] since taking on the governor and the police of the state where the trial is located, in the middle of a well-publicized coal miners' strike, could be a politically sensitive activity for a local * * * firm." 31 F.3d at 179. Petitioners have made no showing that political sensitivities made it "necessary" to use out-of-district counsel here.[4]

Petitioners' reliance (Pet. 11-12) on *Casey* v. *City of Cabool, Missouri*, 12 F.3d 799 (8th Cir. 1993), is similarly misplaced. *Casey* acknowledges that it may be appropriate at times to use out-of-district rates, 12 F.3d at 805, but that acknowledgment is not inconsistent with the local forum rule; the local forum rule merely presumes that local rates are adequate and permits use of out-of-district rates where, among other things, local counsel are unavailable or there is a compelling reason for retaining out-of-district counsel. See p. 5, *supra*. Moreover, in *Casey* itself, the Eighth Circuit did not purport to apply an out-of-district rate. Instead, it "upheld the district court's award of $150 per hour to plaintiff's attorney rather than his customary rate of $185 per hour." Pet. App. A11. It thus "allow[ed] the same result reached by the district court in [this] case." *Ibid.*

Nor is *Planned Parenthood, Sioux Falls Clinic* v. *Miller*, 70 F.3d 517 (8th Cir. 1995) (Pet. 15-17), inconsistent with the decision below. The court there exercised its discretion to award out-of-district rates

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[4] In addition, the court of appeals in that case relied on the complexity of the work and the fact that most of it was appellate in nature. *Rum Creek*, 31 F.3d at 179. Petitioners identify no similar factors in this case.

after conducting a fact-intensive inquiry and concluding that plaintiffs' counsel—who were "leaders in the field of reproductive-rights law [and who had] extensive experience"—were "able to handle the case in a shorter length of time than a local lawyer, without comparable experience." 70 F.3d at 519. Petitioners have made no similar showing here.

b. Petitioners not only fail to identify circuit authority adopting the rule they propose, but also fail to identify a compelling reason why it should be adopted, even in the circumstances of this case. As the Ninth Circuit explained, petitioners "offer[] no evidence that San Francisco rates are necessary to the enforcement of civil rights cases in Sacramento." Pet. App. A11. To the contrary, the record supports the conclusion that qualified Sacramento attorneys were, in fact, available to represent petitioners. *Id.* at A13. Petitioners, of course, were free to select counsel of their choice from San Francisco. But, under these circumstances, there is no reason to permit them to "impose additional costs on defendants for [their] decision to go outside the district" for counsel. *Public Interest Group*, 51 F.3d at 1187.

Moreover, engrafting a "geo-political realities" component onto the local forum, as respondents request, would introduce imprecision and unpredictability into fee calculations, threatening to transform attorney's fees cases into "second major litigation[s]." *Hensley*, 461 U.S. at 437. For example, petitioners nowhere explain how close to the border of a judicial district the injury must arise before their proposed rule would apply; what constitutes "geo-political" differences and connections, and how they may be proved; or how the proposed rule would apply if the market rate in the out-of-district community is lower than the rate within the

judicial district. The cost of the uncertainty that the proposed rule would thus inject into fee calculations outweighs any conceivable benefits the rule might promise.

3. Finally, petitioners argue (Pet. 14-17) that this Court should grant certiorari because the lower courts erred in concluding that qualified counsel were available in Sacramento. This fact-bound contention, which was rejected by both the district court, Pet. App. B21, and the Ninth Circuit, *id.* at A13, does not warrant this Court's review. *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980). The claim lacks merit in any event. As the Ninth Circuit stated: "The same declarations [from Sacramento counsel] offered by [petitioners] to show the unavailability of Sacramento counsel also reveal [that the] declarants themselves * * * have represented plaintiffs like [petitioners] previously." Pet. App. A13.[5]

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[5] Petitioners' passing assertion (Pet. 14 n.7) that certiorari is warranted to correct the district court's alleged error in determining Sacramento's prevailing market rate is similarly a fact-specific claim that does not warrant this Court's attention, *Branti*, 445 U.S. at 512 n.6, and that lacks merit in any event, Pet. App. A14-A15, B22.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1998

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FILED

SEP 14 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nº. 97-2073

In The

Supreme Court of The United States

October Term, 1997

DARNELLA BARJON and LEE DURAN,
Petitioners,

v.

JOHN H. DALTON,
SECRETARY OF THE NAVY,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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12 pp

QUESTION PRESENTED

Respondent, in its Question Presented, misstates the applicable standard of review. While a court's determination as to the *amount* of an attorney fee award is reviewed under the abuse of discretion standard, a determination of the reasonable *hourly rate* "is a finding of fact subsidiary to the total award" and is therefore reviewed under the clearly erroneous standard. *Turner v. Secretary of the Air Force*, 944 F.2d 804, 808 (11th Cir. 1991). *See* Petition for Writ of Certiorari ("Pet.") at 8-9.

Properly framed, the appropriate question presented is this:

Whether the court of appeals was clearly erroneous in rigidly applying the "local forum" rule in defining the "relevant legal community" to determine counsel's reasonable hourly rate.

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REPLY STATEMENT OF THE CASE

1. Respondent perpetuates the same crucial mistake made by the court of appeals when he misconstrues Petitioners' evidence as supporting a finding that "qualified attorneys were available to represent [P]etitioners" in the Sacramento legal market. (Brief for the Respondent in Opposition ("Opp. Br.") at 2.) According to Respondent, this conclusion is justified because declarant attorneys in support of Petitioners "themselves had previously represented plaintiffs who were similarly situated to [P]etitioners." (*Id.* at 3.)

But these plaintiffs were not similarly situated to Petitioners. Petitioners' difficult and costly administrative claims at the Mare Island Naval Shipyard ("MINS") in Vallejo made the *pro bono* assistance offered by nearby Oakland federal sector employment discrimination specialist Elaine Wallace a necessity. (Pet. App. D41-D42, D46-D49 & D60.) In addition, the mere fact that a couple of other attorneys had done this type of litigation *before* does not negate their support of Petitioners' contention that other lawyers with the requisite expertise were not available to undertake Petitioners' administrative actions at that time.

2. Respondent totally ignores the important point that *pro bono* counsel with Ms Wallace's expertise was simply nonexistent in the Sacramento area legal market. (Pet. at 14; Pet. App. A12, B21 & D60.)

3. A "significant portion" of the administrative proceedings (Opp. Br. at 2) did *not* take place in or near Sacramento, or even within the Eastern District. Other than Petitioners' counsel's dealings at MINS, in Vallejo,[1] almost every other significant aspect of the administrative process took place in the Oakland and San Francisco area. (Pet. at 5.)

4. The Navy's determination that an hourly rate of $200 "was a reasonable hourly rate for a Sacramento attorney similarly situated to [P]etitioners' counsel" (Opp. Br. at 2) is flatly contradicted by the EEOC's determination that an hourly rate of $250 was "reasonable" in a MINS employment discrimination complaint brought by Petitioners' counsel during a contemporaneous time period. (Pet. App. E68-E69.) The norm for administrative processing for the MINS facility was this higher rate awarded through the administrative forum in which the work was performed.

REPLY ARGUMENT FOR GRANTING THE WRIT

The decision of the court of appeals is clearly erroneous; the opinion below is at odds with the "reasonableness" considerations of this Court's Section 1988

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[1]Vallejo is geographically closer to the San Francisco-Oakland metropolitan area than to Sacramento and civilian federal employees at MINS receive locality pay at the significantly higher San Francisco Bay area rate than that of their federal counterparts in the Sacramento area. (Pet. App. D50 & D64.)

decisions and in conflict with decisions of other circuits. Review of this important federal question is warranted and necessary to ensure fairness and equitable access to justice for those battling discrimination in federal sector employment.

1. ***The "relevant legal community" for purposes of determining Petitioners' counsel's hourly rate is not limited to Sacramento, the site of the local judicial district.*** This Court's decisions in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Blum v. Stenson*, 465 U.S. 886 (1984), direct lower courts to award, where appropriate under Section 1988, reasonable attorney's fees that take into account "the relevant legal community for similar services . . . ." *Blum*, 465 U.S. at 895-96 n.11. These decisions do not impose a rigid, arbitrary prevailing hourly rate established for an entire federal judicial district.

a. Respondent wrongly argues that Petitioners carry the burden "to prove that out-of-district rates should apply." (Opp. Br. at 3.) The question presented is not whether Petitioners' counsel should receive "out-of-district rates," but whether counsel should be awarded the applicable hourly rate of the "relevant legal community" in which Petitioners litigated their administrative claims of federal employment discrimination.

In such an instance, *Hensley* and *Blum* dictate that lower courts consider the geo-political area of the legal representation and not just the arbitrary boundary lines of a federal judicial district. That is what the district court did in *Vaughns v. Board of Education of Prince George's County*,

598 F.Supp. 1262 (D. Md. 1984), when it "t[ook] into account" the hourly rates of abutting Washington D.C. even though the countywide desegregation case was pending a district court sitting in Baltimore. That is what a different panel of the Ninth Circuit did in *Gates v. Rowland*, 39 F.3d 1439 (9th Cir.), when it considered San Francisco Bay area hourly rates for litigation monitoring a Vacaville correctional facility pending in the district court in Sacramento.[2] Vacaville is actually closer to Sacramento than is the MINS facility in Vallejo.

b. The reasonableness of these holdings is confirmed by the courts' analyses in *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169 (4th Cir. 1994), *Casey v. City of Cabool*, 12 F.3d 799 (8th Cir. 1993), and *Planned Parenthood, Sioux Falls Clinic v. Miller*, 70 F.3d 517 (8th Cir. 1995), already quoted in the Petition. (Pet. 11-12 & 15-16.) Respondent's efforts to distinguish these analyses (Opp. Br. at 7-9) misses the point of *Hensley* and *Blum*, *viz.*, that, for lack of a better term, "geo-political" considerations are indeed routinely employed to define the "relevant legal community" for prevailing hourly rates and arrive at a reasonable fee award.

Although the local judicial district "may be the first place to look," *Rum Creek*, 31 F.3d at 179, and its rates may ultimately be applicable, as in *Casey*, other considerations of

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[2]Respondent failed to refute the rationale of these decisions in his opposition.

proximity and economic and political realities also are to be considered. These considerations will no more create "a second major litigation," as Respondent speculates (Opp. Br. at 6), than the typical considerations courts factor into fee awards.

The ultimate purpose of the relevant legal community standard is to prevent an opposing party from becoming liable for the risk of expensive attorney's fees not customary within the local community. The effect of the court of appeals' application of a Sacramento rate on federal employees at MINS is to impose a rate that is not the rate of that local community, irrespective of whether it is higher or lower.

c. The undisputed facts of this case refute this constricted application of the local forum rule. Vallejo is closer to Oakland than Sacramento. Vallejo is considered part of the San Francisco Bay area for pay purposes. Counsel conferred with Petitioners in Oakland and Vallejo. Counsel conferenced by phone from her office in Oakland to the Navy legal department at MINS in Vallejo. The administrative law judge who decided the Barjon complaint conducted the teleconference hearing from an office in San Francisco. The paperwork for the Duran settlement was exchanged in Petitioners' counsel's office in Oakland and another administrative law judge officed in San Francisco was notified of the settlement.

d. Petitioners do not argue for a "revision" of this Court's "relevant legal community" standard, as Respondent suggests. (Opp. Br. at 7.) Petitioners contend the court of

appeals misapplied the local forum rule when it ignored these undisputed facts in defining the "relevant legal community." This decision is clearly erroneous and is in conflict with this Court's precedent and the decisions of other circuits.

2. ***The "relevant legal community" for purposes of determining available qualified counsel is not limited to Sacramento, the community where the district court sits.*** Petitioners came to Oakland attorney Elaine Wallace to undertake their representation not only because she was geographically closer than Sacramento area attorneys, but because she charged them one dollar apiece to litigate in her field of expertise. federal employment discrimination. (Pet. App. D41-D42, D46-D48 & D58.) Legal representation tantamount to *pro bono* assistance from an expert was not available in Sacramento.

a. Respondent contends Petitioners "offered no evidence" that Oakland rates "were necessary to the enforcment of civil rights cases in Sacramento" -- that, in fact, Petitioners' evidence "pointed in the opposite direction." (Opp. Br. at 3-4.)

Again, this mischaracterizes both the nature of Petitioners' complaints and the substance of their evidence. Petitioners administrative discrimination complaints for employment practices at MINS were not run-of-the-mill civil rights cases. This is a specialized field, of which Ms Wallace is an undisputed expert, particularly with regard to MINS adminstrative actions. (Pet. App. D52-D55.)

The declarations in support of counsel's hourly rate of $250 were divided between attorneys who represent nonfederal employees, attorneys who no longer represent federal employees, and attorneys who have represented a "few" federal employees. (Pet. App. D58-D59.) Petitioners themselves knew of no qualified attorney in Sacramento. (Pet. App. D46.) This is hardly evidence of readily available qualified counsel in Sacramento. *See Rum Creek*, *supra*, 31 F.3d at 179 ("the complexity and specialized nature of a case may mean no attorney, with the required skills, is available locally").

b. Petitioners acted reasonably in locating and utilizing a federal employment law specialist in nearby Oakland, even though competent Sacramento counsel "could have handled this case, and handled it well." *Planned Parenthood, Sioux Falls Clinic v. Miller*, 70 F.3d 517, 519 (8th Cir. 1995). The court of appeals erroneously limited the relevant legal community when it ignored the realistic availability of Sacramento area counsel qualified to litigate administrative complaints at MINS in Vallejo for a dollar.

CONCLUSION

For these additional reasons, the Court should grant the petition and issue its writ of *certiorari*.

Respectfully submitted,

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